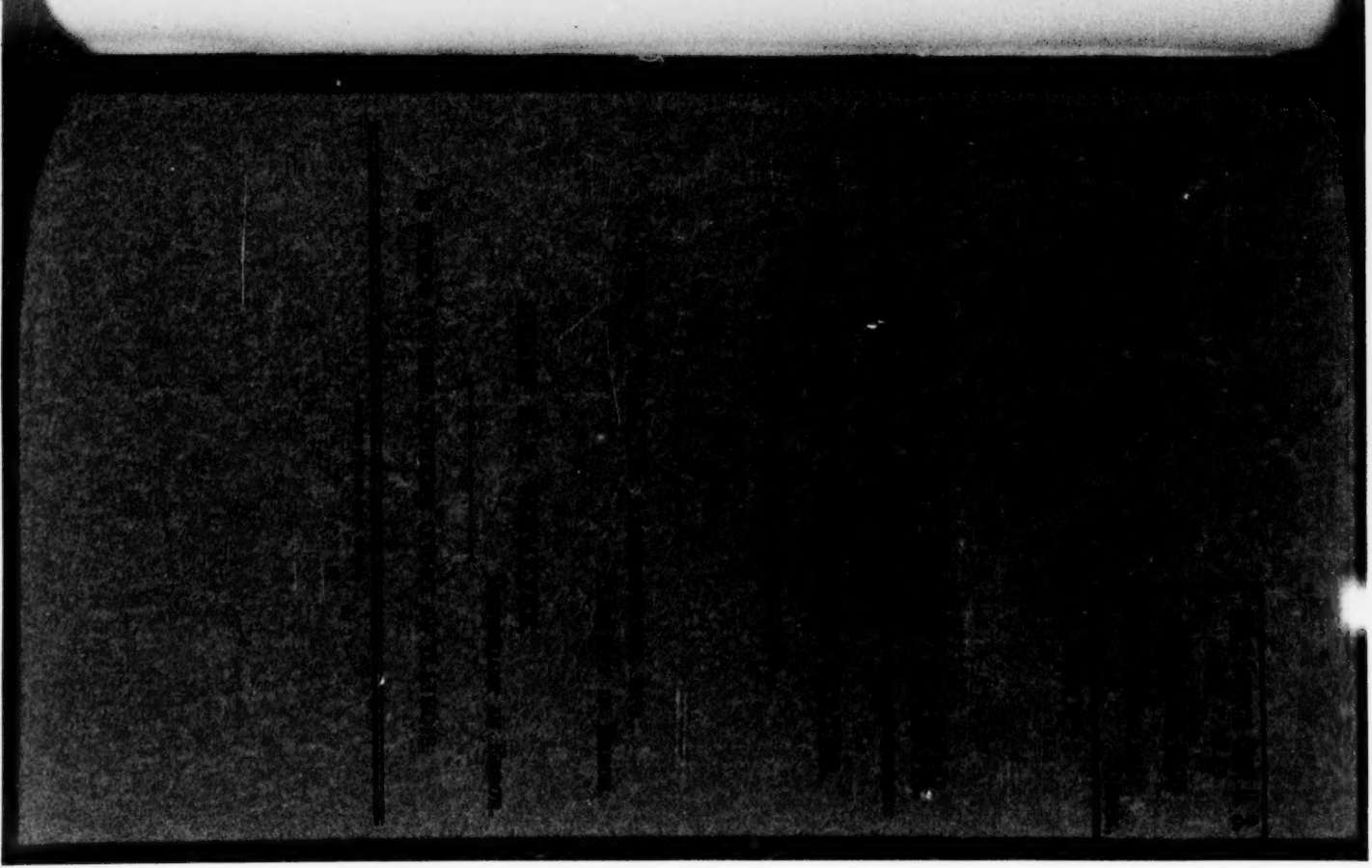


Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 180.

OLIVER O. FORSYTH, ADMINISTRATOR, ETC.,
Plaintiff in Error,

vs.

HENRY F. T. VEHMEYER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

In the haste of preparing the brief against the motion to dismiss or affirm, the undersigned could not reach the transcript and was obliged to depend on an abstract made by another hand.

The transcript now being printed shows that the case of appellant is much stronger than that abstract had exhibited it, and requires that a statement of the case be now made from the transcript itself.

STATEMENT.

Writ of Error to *Supreme Court of Illinois* (Trans., p. 1, Marg. p. c), brings up a judgment of that court entered October 24, 1898 (Trans., p. 90, Marg. p. 161), affirming a judgment of the *Appellate Court of Illinois* (First District) entered April 18, 1898 (Trans., p. 87, Marg. p. 156), affirming a judgment of the *Superior Court of Cook County, Illinois* (Trans., p. 20; Marg. p. 34), in favor of Henry F. T. Vehmeyer against Jacob Forsyth for $833.35 debt and $2,076.90 damages and costs, entered June 24, 1897.

Transcript 97, Marg. p. 172. *Petition* to the Chief Justice of the Supreme Court of Illinois for allowance of the writ of error alleged the following ground for bringing the cause to this court:

"*The decision of the cause is, that the discharge in bankruptcy of Jacob Forsyth, duly granted by the District Court of the United States in and for the District of Indiana, which was duly pleaded to the action and proved, is not sufficient to bar the action, and the case is within the jurisdiction of the Supreme Court of the United States, for review thereof by writ of error.*"

This petition was allowed by the Chief Justice of Illinois, by order endorsed thereon. (Trans., 97, p. 172.)

It is necessary to pick out the pleadings on which the judgment was entered in the Superior Court of Cook County January 24, 1897, which is here under review.

The transcript shows that Vehmeyer filed a præcipe in debt and *a declaration* against Forsyth February 24, 1891 (Trans., 5-6; Marg. pp. 3, 5), upon an alleged judgment entered at the June term, A. D. 1871, of the same court; alleging that the record was destroyed in the great Chicago fire of October 9, 1871.

Defendant Forsyth filed three pleas on April 8, 1891. (Trans., 7; Marg. p. 7.) The first plea was *nil debet;* the second *nul tiel record;* the third *discharge in bankruptcy.*

Plaintiff on December 18, 1891, *demurred* to the first plea; *replied* the record to the second plea, and concluded to the country; and *replied* double to the third plea, namely: First replication, debt created by fraud; second, no record of alleged discharge in bankruptcy. (Trans., 8; Marg. pp. 9-12.)

The demurrer to the first plea was sustained by the court. (Trans., 10; Marg. p. 12.)

Defendant having demurred to the replications (Trans., 10; Marg. p. 10), amendments were allowed, and defendant was ruled to rejoin. (Trans., 11; Marg. p. 15.)

Rejoinder concluding to the country (Trans., 12; Marg. p. 16) put the case at issue (similiter being waived) and the case went to a judgment against the defendant Feb-

ruary 21, 1894; from which he *appealed* to the Appellate Court of Illinois (Trans., 13; Marg. p. 19); the appeal in Illinois in common law cases having the effect of a writ of error.

The mandate of the Appellate Court is not among the files (Trans., 13; Marg. p. 20); but on January 2, 1895, on motion of defendant and due notice to plaintiff the *Superior Court* ordered that the cause be redocketed in that court (Trans., 14; p. 20); and on January 31, 1895, *on motion* of plaintiff, leave was given him to file *an amended declaration*, and defendant was ruled to plead thereto within ten days. (Trans., 14; Marg. p. 21.)

This begins the pleading which made the issue, on which the judgment was entered June 24, 1897, which has been brought to this court by this Writ of Error.

The following show said pleadings:

DECLARATION filed January 31, 1895.
(Trans., 14; Marg. p. 22.)

Plaintiff Vehmeyer complains of Jacob Forsyth, defendant, in a plea of debt—For that, whereas the plaintiff in the July term, A. D. 1871, of said Superior Court, recovered against the defendant in an action on the case the sum of $833.33 damages, and $6.75 costs, as by the record which was remaining until the destruction thereof by fire in October, 1871, did more fully appear; and which judgment still remains in full force.

(There is the usual conclusion.)

Ordered by the court (the parties agreeing) that the defendant's second and third pleas heretofore filed to plaintiff's original declaration stand, to said amended declaration.

The second plea (that there was no record of the alleged judgment of 1871) and an additional plea filed by defendant, and the demurrer thereto and order sustaining the same (Trans., 17-20) may be disregarded.

PLEA OF DISCHARGE IN BANKRUPTCY.
Transcript, 7; Marg. p. 7.)

The third plea, aforesaid, set up in manner and form

prescribed by the act of congress, a discharge in bankruptcy in the statutory form, granted to Jacob Forsyth December 30, 1880, in the District Court of the United States for the District of Indiana.

The plea concludes with a verification.

REPLICATION.

(Transcript, 8; Marg. p. 10.)

(NOTE: *This reply is here copied in haec verba,* after the words *precludi non,* because the burden was on the plaintiff to *aver* facts establishing that the debt was *created* by the fraud of the defendant, and *to prove the facts alleged;* and *this replication does not allege facts establishing that the debt was created by the fraud of the defendant.*)

And the plaintiff, as to the plea of the defendant, by him thirdly above pleaded, says *precludi non, etc.,* "because he says that the action, wherein the judgment mentioned in the plaintiff's declaration in this case was recovered against said defendant, was brought by the plaintiff against the defendant in the said Superior Court of Cook County to recover damages claimed, by the plaintiff in said action, to have been sustained by said plaintiff, by reason of alleged fraud practiced by the defendant upon said plaintiff, by which the plaintiff was induced to advance and pay to the defendant a large amount of money, to wit: about the sum of $1,200, by the false and fraudulent *representations* of the defendant, *that he,* the defendant, *owned and had in his possession, ready for delivery, a large quantity, to wit: 600 cords of cordwood in Lake County in the State of Indiana;* and that the said action, and the right to recover therein were founded solely upon the *said* fraud of the said defendant. And the plaintiff avers that issue was joined in that action by the parties thereto, upon the material allegations *so made* by said plaintiff therein in respect to said fraud; and that a trial by a jury was had therein; and a verdict, upon the issues *so joined,* was rendered therein in favor of the plaintiff, and against the defendant for said sum of $833.33, as the damages which had been sustained by said plaintiff by reason of said alleged fraud of the defendant. And the plaintiff avers that the judgment here-

inabove set forth in the plaintiff's declaration was entered and rendered by said Superior Court of Cook County upon said verdict aforesaid; and was founded solely upon the fraud practiced by the defendant, *as aforesaid*, upon said plaintiff. And plaintiff avers that said judgment in his said declaration set forth is a debt or claim, which is by said act, in defendant's third plea mentioned, excepted from the operation of the discharge in bankruptcy, which is by said defendant in his said third plea pleaded and set forth; and the plaintiff was not by virtue of his said discharge in bankruptcy, in said third plea pleaded discharged from the debt or claim of the judgment mentioned and set forth in plaintiff's declaration herein. And this plaintiff is ready to verify.

A further replication alleged that there was no record of the supposed discharge, etc.

REJOINDER.

(Transcript, 12; Marg. p. 16.)

Defendant's rejoinder traverses each averment of said replication, and concludes to the country.

TRIAL AND JUDGMENT.

(Transcript, 20; Marg. p. 34.)

June 24, 1897.

By agreement of parties the cause is submitted to the court, for trial without a jury.

The court finds the issues for the plaintiff, and that there is now due and owing from the defendant to the plaintiff the sum of $833.35 debt; and assesses the plaintiff's damages at the sum of $2,076.90.

Whereupon defendant enters his motion for a new trial.

After argument the motion is overruled.

Therefore it is considered by the court that the plaintiff do have and recover, etc.

Defendant having entered his exceptions, time is given to prepare his bill of exceptions.

REVISED STATUTES OF ILLINOIS, Chapter 110.

Sec. 41. In all cases, in any court of record in this state, if both parties shall agree, both matters of law and fact may be tried by the court; and upon such trial either party may, within such time as the

court may require, submit to the court written propositions to be held as law in the decision of the case; upon which the court shall write "refused" or "held," *as he shall be of opinion is the law,* or modify the same, to which either party may except, as to other opinions of the court.

Sec. 56. * * * if either party may wish to except to the verdict, or, for other causes, to move for a new trial * * * he shall before final judgment be entered, or during the term it is entered * * * file the points in writing * * * and final judgment shall thereupon be stayed until such motion can be heard by the court.

* * * *

In all cases where a new trial shall be granted on account of improper instructions having been given by the judge, or improper evidence admitted, or *because the verdict of the jury is contrary to the weight of the evidence,* or for any other cause not the fault of the party applying for such new trial, *said new trial shall be granted,* without costs, *as of right.*

Sec. 59. If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception, and sign and seal the same; and the said exception shall thereupon become part of the record of such cause.

Sec. 60. Exceptions taken to the decisions of the court, upon the trial of causes, in which the parties agree that both matters of law and fact may be tried by the court, shall be deemed and held to have been properly taken and allowed; and the party excepting may assign for error before the Supreme (or Appellate) Court any decision so excepted to, whether such exception relates to improper, or rejecting proper testimony, or to the final judgment of the court upon the law and the evidence.

Sec. 61. Exceptions taken to the decisions of the court, overruling motions in arrest of judgment, motions for new trials, motions to amend and for continuances of causes shall be allowed; and the party excepting may assign for error any decision so excepted to.

This statute has received construction by the Supreme Court of Illinois.

"Where the trial is had by the court,—as to the facts the court stands in the place of the jury—and the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury. (*Field* v. *C. & R. I. R. R. Co.*, 71 Ill., 458, p. 461.)

A new trial will be granted by the Supreme Court as of right, where the verdict of the jury is manifestly against the evidence. (*Southworth* v. *Hogg*, 42 Ill., 446, p. 449; *Coal Co.* v. *Lamprecht*, 51 Ill. App., 649; *I. C. R. R. Co.* v. *O'Keefe*, 154 Ill., 508, p. 511.)

In the case at bar the exceptions were saved, and the bill of exceptions was signed, sealed and made part of the record in apt time. (*The People* v. *Gary*, 105 Ill., 264, pp. 269-270; *Ferris* v. *Com. Nat. Bk.*, 158 Ill., 237, p.

239; *U. S. L. Ins. Co.* v. *Shattuck,* 159 Ill., 610, pp. 614-5.)

THE BILL OF EXCEPTIONS contains all of the evidence. (Trans., 79; Marg. p. 143.)

It states that "the plaintiff *to maintain the issues* upon his part introduced the following evidence."

James Frake, called by the plaintiff, testified: I am a lawyer. I have since 1869 been a practicing attorney in Chicago, Cook County, Illinois.

In 1870, as a partner in the firm of Bushnell & Frake, I brought the suit of Henry F. T. Vehmeyer against Jacob Forsyth, and I conducted the suit. (Trans., 24; Marg. p. 42.) I drew the declaration in one count. The effect of the question and answer is that he could not remember the contents of the declaration. It was: "Do you remember *the contents* of the declaration? A. Well—I remember *the substance* of it.

The declaration was filed July 21, 1870.

I have not a copy of the declaration.

It was burned in the Court House on the morning of October 9, 1871.

It is not possible to produce the original declaration *nor any copy of it.*

I did not preserve any copy made at the time.

I have reproduced, as fully and completely as I can, the contents of that declaration, and have it here. It is, to the best of my knowledge, belief and recollection, substantially a copy of that declaration, filed July 21, 1870, in the Superior Court. It was made about four years ago, in the fall of 1893 or thereabouts.

The attorney for the plaintiff stated: "It does not pretend to be a copy made from or by comparison with the original. It pretends to be from his personal recollection of what that declaration was—put in that form."

Of course the paper made up twenty-two years after the original declaration was destroyed was excluded both as evidence, and to refresh memory; but is referred to as it shows vividly the weakness and imperfectness of the testimony to the contents of the destroyed paper. And, as showing the little credence to be allowed such testimony, it is to be remembered that both by the common law, and

by the statute of Illinois (in force four months after the destruction, R. S., Ch. 116, Sec. 2) not only might the evidence have been perpetuated, but the court to which the record belonged would have restored the lost paper, from evidence of its contents, while it was fresh in memory. They waited till June 18, 1897, twenty-six years after the paper burned, and seventeen years after the debtor had been discharged in bankruptcy, and then attempted to prove that the debt was created by fraud, by the oral testimony of an interested witness, as to the contents of the burned paper.

Transcript 26: The testimony showed that the witness was not in fact giving a memory, of the lost paper, but what he thought it ought to have been, and what he wanted it to be, by consulting Puterbaugh's and Chitty's Pleadings, and the paper he made up in 1893.

He gave the following:

Superior Court of Cook County.

To the July Term, or of the August Term, 1870.

County of Cook and State of Illinois.

Henry F. T. Vehmeyer, by Bushnell & Frake, his attorneys, plaintiff, complains of Jacob Forsyth, defendant, summoned, etc., in a trespass on the case, for that whereas, heretofore, to wit: on the 10th day of August, 1868, *in order to induce the plaintiff to advance to him a large amount of money, to wit: the sum of* fifteen hundred dollars, I think the declaration would say *twelve hundred dollars, falsely and fraudulently represented unto the plaintiff that he had a large amount of* birch *cordwood, to wit: the sum of two hundred cords,* cut and piled up near the Pittsburgh and Fort Wayne, or, I should say—(Here the plaintiff's attorney cut in and said "that's right," and the witness continued) the Pittsburgh and Fort Wayne, *in the County of Lake and State of Indiana,* ready to be shipped to Chicago; that said wood was contracted, or, rather, perhaps—one Eldredge had contracted to purchase said wood at six dollars per cord in the city of Chicago, when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of five dollars per cord for the two hundred cords of wood, he, defendant, would imme-

diately ship said cordwood to the city of Chicago. That the plaintiff Vehmeyer relying upon these representations as being true, advanced to the plaintiff—(Here plaintiff's attorney again cut in with the words, "to the defendant," and the witness continued)—advanced to the defendant the said sum of—I think the declaration said the sum of twelve hundred dollars or one thousand dollars; that the said defendant shipped only the sum of forty cords of wood to the said Eldredge, from which the said Vehmeyer received the sum of six dollars per cord—I don't know whether it is right or not—that the representations of the defendant falsely, were false and fraudulent. That he did not have nor never did have in the County of Lake and State of Indiana two hundred cords of birch wood piled up ready for shipment to the city of Chicago, to sell said Eldredge, but only had, neither in the County of Lake or anywhere else—but only had the sum of forty cords of birch wood which was shipped by the said defendant to said Eldredge.

Wherefore the defendant was therein—(Here plaintiff's attorney cut in again with the words: "The plaintiff, you mean," and the witness continued)—Wherefore the plaintiff was damaged to the extent of fifteen hundred dollars, was the amount that was alleged in the declaration, and thence he brings this action of fraud and deceit against the defendant.

Defendant's attorney objected (Trans., 28; Marg. p. 49): I object to all the statements of the witness *pretending to make up an alleged declaration* in this case as he has recited them, on the ground that it simply purports to be a substantial copy made from the recollection of the witness some twenty years after the declaration was filed.

The objection was overruled and exception duly saved.

NOTE: It is clear that this is not a full, true, complete and perfect copy of the document which formed part of *the record* remaining in the Superior Court of Cook County before the fire of 1871, as the words of an exemplification of the proper officer, or even the oath of a witness who had made a copy or had compared a copy with the original, would have stated such a copy to be.

This witness does not testify that any word given by him was in the original; and while it may be implied that some words, as the name of the court, the venue, and the names of parties were in the paper, there is no testimony, that any series of words given were in the original declaration.

A record may and must be tried by itself. The court must peruse a written document and judge, from the words used, their grammatical arrangement, and their grouping into sentences, etc., what is the effect of the document.

The Standard dictionary says of giving a substantial statement of such a matter: "Giving the correct idea, though not the exact expressions." And Webster defines Substance: "That which underlies all outward manifestations."

It is evident, from the testimony, that the witness only testified to his idea of what the declaration meant (which he had not seen for twenty-six years), given in as nearly similar expressions to those used in the lost instrument as he could now make up.

The judges of this court, with written documents, or pleadings in print before them, and counsel commenting on them, often differ from the counsel as to the substance and legal effect of the writing. And this illustrates that *the matter above written is not the declaration, nor a copy of the declaration*, which in 1871 formed part of the record of a judgment against Forsyth; but is only the *judgment* of the witness as to what its idea was, formed from impressions of the supposed *idea* left in the vague memory of the witness, for scores of years after the tenor and exact words and expressions had passed from his memory.

It may be evidence, to be received for what it is worth, tending in a remote degree, to show what were the contents of the destroyed record, *but it is not the record, nor a copy of the record.*

If the paper was here your Honors could judge what it meant, what its substance was. It is not here, and your Honors cannot judge what it meant nor what its substance was; but only have the judgment of the witness, as he testifies to his judgment from remote and vague impressions of the words and sentences, and a thousand other matters which now influence his impressions.

NOTE 2: In the foregoing (supposed substance of the lost declaration) we have italicized all that was averred, in the case at bar, of statement of fraud, in the confession and avoidance of the discharge in bankruptcy. (Trans., 8-9; Marg. p. 10.) And even in the italicized matter there is a variance.

In the replication (Trans., pp. 8-9; Marg. p. 10) the averment was that the judgment sued on was for damages "claimed by the plaintiff in said action to have been sustained by said plaintiff by reason of alleged fraud practiced by the defendant upon said plaintiff, by which the plaintiff was induced to advance and pay to the defendant a large sum of money, to wit: about the sum of twelve hundred dollars, by the false and fraudulent representations of the defendant, that, he, the defendant, owned and had in his possession, ready for delivery, a large quantity, to wit: six hundred cords of cordwood in Lake County in the State of Indiana."

That is the only averment of fraud in the case at bar. The next line speaks of *said fraud;* and all after that, refers to the fraud *aforesaid,* or uses like words of reference.

The first variance is, that the averment of the fraud in this case is, that the judgment was got on a false representation by defendant that he, defendant, *owned and had in his possession* a large quantity, to wit: *six* hundred cords of wood in Lake County in the State of Indiana.

The evidence of the substance of that declaration is of a representation by defendant that he *had* a large amount, to wit: *two* hundred cords.

Declaration on a representation of defendant that he *had two* hundred cords, would not sustain the averment of this case that the declaration was on a false averment that *he owned and had in his possession, six hundred cords.*

If the judgment of 1871 was on a declaration of which the substance was as witness states it, that told of *birch* wood, where it was cut and piled, that a purchaser had contracted to purchase it, and that Forsyth got the money by representing that if Vehmeyer would advance him five dollars per cord on the two hundred cords, he, Forsyth, would immediately ship the cordwood to Chicago. It then told that Forsyth only shipped forty cords; that he did not have 200 cords to ship to sell to Eldredge, but only had forty cords, which was shipped to Eldredge.

If that constituted fraud, and if the judgment of 1871 was for a debt created by that fraud, the plaintiff did not mention it in his pleadings in this case. He did not set up any of it to avoid the discharge in bankruptcy.

The witness further testified (Trans., 29): There was only one count in the declaration—of that I am certain.

The defendant's plea was not guilty.

There was no other issue in that case.

There are no records of the proceedings now in existence. I saw them burn. (Oct. 9, 1871.)

The verdict was:

"We, the jury, find the defendant guilty, and assess the plaintiff's damages at $833.35."

I think I know what was the record of the judgment of the court that was rendered at the time. I saw the judgment once. From what I there saw, I can *substantially* state what the judgment was:

Henry F. T. Vehmeyer, plaintiff, *vs.* Jacob Forsyth, defendant. Case. This day came on to be heard the motion of defendant to set aside the verdict aforesaid and for a new trial of said cause—was argued by counsel, and the court being fully advised in the premises doth overrule said motion. Therefore it is ordered by the court—(Plaintiff's attorney here broke in with: "Considered.") Therefore it is considered by the court that the plaintiff have and recover from the defendant his said damages $833.35 in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefor.

On cross-examination the witness testified that he brought this present suit in 1890, a little less than twenty years from the date of the judgment. That Mr. Vehmeyer had for five or six years been drumming at him to begin the suit before he brought it.

Because plaintiff acknowledged that he had not proved what the record was, but had only produced evidence tending to show what it was, he called another witness to prove another circumstance which tended to show to some extent the substance and effect of the burned record.

R. R. Stevens, called by plaintiff, testified (Trans., 33;

Marg. p. 58) that in 1871, in the employ of Chase Brothers & Company he made brief notes from the papers and *memoranda in the minute book of the clerk* of the court (Trans., 40-1), among which he made the minutes shown on page 39 of the printed transcript. These gave the name of the action as "trespass on the case."

Discharge in Bankruptcy Proved.

Defendant, to maintain the issues on his part read in evidence a duly certified copy of the record of his *discharge in bankruptcy* on December 30, 1880. (Trans., 55.)

It is in all respects complete; and established his plea beyond all peradventure; for the discharge authorized by law is proved by the record, against which no evidence could be given. No doubt of the genuineness and correctness of the discharge was suggested; and the plea stood proved.

The case then stood upon the plaintiff's replication of confession and *avoidance*.

The burden of proof was on the plaintiff to avoid the effect of the discharge; and we have referred to the evidence which he presented.

Other Evidence for Defendant.

Marshall Waite, called by defendant (Trans., 72; Marg. p. 133), testified to the making of the abstract books of Shortall & Hoard in 1871—(as R. R. Stevens had testified to the making of those of Chase Brothers & Company)—and he produced the entry of Shortall & Hoard, of this case and judgment, which is shown on page 74 of the transcript, and which agrees with that of Chase Brothers & Company except in the column headed "Action." Chase Brothers & Company (as we saw when considering Mr. Stevens' testimony) gave the "Action" as "*Trespass on the case.*" Shortall & Hoard wrote it down as "*Assumpsit.*"

Jacob Forsyth, the defendant, testified (Trans., 45): I remember the trial of this case in the year 1871. I was present at the trial. I remember for what I was sued in that case. *I know* for what I was sued in that case.

I have that account with Vehmeyer which shows precisely what it was for.

(The account and letters were offered, objected to and excluded; and we will recur to them later. We are now on the matters actually proved.)

There had been a former trial of the case at bar, in January, 1894. (Trans., p. 13.) At that trial it was conceded that it was proper to introduce testimony showing what the evidence was, which was given at the trial in 1871. It was admitted to show what the real subject of the litigation was, notwithstanding the testimony which the witness Frake gave as to the substance and effect of the declaration as originally filed in that case. (Trans., 64-5.) Robert C. Forsyth was a witness at that trial; and, to avoid having to go into a place many miles from the railway station in the mountains of the extreme northwest, the plaintiff stipulated as to what he testified at the trial of 1894, and that it might be read as his deposition at the next trial. (Trans., 58-9, 64.) *It was read on the trial below.* It was objected to, but the objection was not insisted on, and the testimony stands as evidence given in the case, as weighty as if the witness had been upon the stand.

Further, although Mr. Frake, who tried the cause for the plaintiff in 1871, was recalled as a witness in rebuttal, on behalf of the plaintiff (Trans., 77), he did not contradict the evidence which we below recite in the least. *The matters so testified to, by Robert C. Forsyth, were not denied, and stand proved in the record of this case.*

Transcript 59: *Robert C. Forsyth* testified: I am the son of Jacob Forsyth. I was present at the trial of the case of Vehmeyer against my father. (In 1871, before Judge Porter and a jury, p. 61.) I was a witness.

Jacob Forsyth was a witness on that trial. I did not hear his testimony. I was too far away, back in the court (p. 59).

I saw Vehmeyer on the stand, but did not hear what he said. I saw Marshall on the stand. I could not hear what took place on the stand. I was in the court, at the farther end of the room; away off from the witness stand. (p. 62.)

I was the last witness on the stand. (p. 62.)

I testified upon the stand to the amount of the wood being on hand, and the fact that Vehmeyer had declined to take any more; that he told me that he didn't need any more wood. I testified that Vehmeyer had told me that he did not want any more wood. That was before Judge Porter. (p. 61; Marg. 115.)

INSTRUCTIONS TO THE JURY.

I was in the witness chair when I heard the judge discuss the question as to what kind of a judgment should be entered. (p. 64.)

I heard the directions of the judge as to the character of the judgment. When the jury came in from the jury room, I heard the judge and the lawyer for the plaintiff argue about the character of the judgment; the plaintiff wanted the judgment for fraud as well as for the amount of the indebtedness; and the judge would not allow that—as there had not been any fraud proven—as Vehmeyer had declined to take any more wood. He was getting wood at the time and he declined to take any more. I am stating what the judge said. That is what he said. He said there had been no fraud proven. He said Vehmeyer had been getting the wood and had refused to take any more. (p. 60; Marg. 113.)

This took place in the court room, in the Superior Court. I had been the last witness on the stand. When I heard the judge talking, was after the jury came in. The jury were in their seats before him. (p. 62.)

I was in the witness chair. (p. 64.)

The above matter was proved, without question or the slightest contradiction.

S. J. Harmon testified that he was with the attorneys for the defendant at the time of that trial in 1871, and was present at part of the trial. (p. 70.) The case was tried before Judge Porter and a jury. I was back and forwards from the office, and was present at the trial part of the time. He was asked:

"Do you remember whether or not, the jury at any time

after it had gone out, asked the court for further instructions in the case?"

This was objected to, and defendant's counsel was required to state what he offered to show by the witness, and he said:

"I offer to show, by this witness, that after the jury had retired, they came out, and asked the court, as to whether or not they could find there was fraud involved in the case; and that Judge Porter then instructed the jury, that no fraud had been shown in the case; and that it was the duty of the jury simply to determine the amount, if any, which Forsyth owed to Vehmeyer."

The objections were sustained, the evidence excluded, and defendant excepted. (p. 71, Marg. 131-3.)

ATTEMPTS TO PROVE WHAT EVIDENCE WAS GIVEN AT THE TRIAL IN 1871.

John Marshall (p. 68), who was a witness in the trial of 1871, testified, that he remembered some of the evidence given, and defendant offered to prove by him "that he heard Vehmeyer swear on the trial of that case that he, Vehmeyer, had ordered Forsyth not to ship any more of the wood."

On objection this evidence was excluded and exception saved. (p. 69; Marg. 127-28.)

He testified: In 1869 and 1870 I was in the employ of Forsyth as foreman in Indiana. I remember the case of Vehmeyer against Forsyth tried in 1871. I was a witness in that case. I remember some of the evidence given. Objection being made, defendant offered to prove by this witness:

"That in relation to the 200 cords of wood in question he testified that Mr. Forsyth did have that amount of cordwood, and more, for a long time prior to this lawsuit, and that at the time Vehmeyer claims to have wanted it, * * * Vehmeyer instructed this witness at Castello, Indiana, that he should not ship any more wood to him (Vehmeyer) on account of Forsyth; and that this witness was then handling and cutting wood for Forsyth in the woods."

Objections to the evidence were made and the evidence excluded and exceptions saved. (p. 69.)

Jacob Forsyth, being on the stand, was asked:

"Q. You may state, if you recollect, what the testimony of Vehmeyer was as to his cause of action against you in that case?"

Plaintiff objected, the evidence was excluded and defendant excepted. (p. 46; Marg. 87.)

Jacob Forsyth testified (p. 46) as we have seen: I know what I was sued for in that case. I have that account with Vehmeyer, *which shows, precisely,* what it was for.

He was then asked as follows:

Q. From a reference to that account could you, of your own independent recollection, state what Mr. Vehmeyer claimed upon that trial of the case?

Plaintiff objected, and the evidence was excluded.

Q. You may state, if you recollect, what the testimony of Vehmeyer was as to his cause of action against you in that case?

Plaintiff objected and the evidence was excluded.

Q. *Have you a statement in your possession made by Vehmeyer of his account against you, as it stood prior to the trial of the case in 1871?* (p. 7.) A. I have.

Q. Look at this document, which I now hand you, dated Chicago, *May 1st, 1869,* purporting to be a statement of account, made and signed by Henry Vehmeyer, and addressed to J. Forsyth, and state whose signature is attached to that document?

A. That was received by me at the post-office at Cassello, Indiana, through the post-office. (Page 48.) The signature attached to it is the signature of Henry Vehmeyer. It is dated May 1st, 1869; and I received it soon after.

Q. Did you have it in your possession prior to the bringing of the original suit against you?

A. I did.

Q. Had you *any other statement* of account from Mr. Vehmeyer, prior to his bringing the original suit against you?

A. *I had a letter from him which contained a statement of account.*

Q. Is this (paper evidently shown) the last statement of account you received from Vehmeyer prior to his bringing the original suit against you?

A. Yes. That is the last one.

(It is evident that in offering or marking the papers, they were mixed, for the first offered was the earliest in date.)

Page 50. Q. Look at the documents which I now hand you, dated Chicago, April 3d, 1869, addressed to Mr. Jacob Forsyth, and purporting to be signed by Henry Vehmeyer, and state whose signature is attached to it?

A. Henry Vehmeyer's.

It came to me through the post-office about the time it was dated, giving a reasonable time for delivery.

The two papers identified by Forsyth were offered, but were objected to by plaintiff and excluded.

The first (Trans., p. 48) is a letter from plaintiff, Vehmeyer to defendant, Forsyth, bearing date April 3, 1869. It refers to transactions extending over sixteen months, and makes no suggestion that Forsyth had got a dollar from him by fraud. It refers to having sold wood for Forsyth during the previous winter, to Forsyth's having sent him a few cars, and to Forsyth having sent wood to others, but it does not say anything of Eldredge or suggest that Forsyth had not 200 cords of wood.

The second paper (Trans., p. 50) is *a stated account* bearing date May 1, 1869, and *signed by Henry Vehmeyer.*

It begins by charging *grocery bills* from April 15, 1866, to April 1, 1867, amounting to $338.61.

It then adds interest, at the rate of six per cent. per annum, on that amount, to the first day of May, 1869, and the grocery bills and interest to the date of the account May 1, 1869, give a total of $437.52 to May 1, 1869.

The account then returns to a charge of December 5, 1867—

200 cords of wood at $5—Total cash for wood.$ 923.40
Commission or *profit on wood to* have been by February 1, 1869..... 200.00

These two amounts are footed.....$1,123.40
Then a credit to Forsyth is deducted.
By credit 270.00
And a balance is stated.

"Balance .....$ 853.40
To this sum is added interest at the rate of ten per cent. per annum for fifteen months..... 106.67

The computation is right as stated; $106.67 is the interest on $853.40 for fifteen months at the rate of ten per cent. per annum; and as fifteen months prior to May 1, 1869, would have begun February 1, 1868, it shows that the cash charged for was not advanced December 5, 1867, but later; and as the charge is "*total* cash for wood," it appears that it was paid in different sums. Putting the two sets of facts together it shows a claim of payment by Vehmeyer to Forsyth of $923.40 in lesser sums at different times, of which the average dates from which they could draw interest would be February 1, 1868.

The account thus having charged Forsyth:
A balance (of February 1, 1868).....$ 853.40
Interest 15 months (from February 1, 1868, to May 1, 1869), at the rate of ten per cent. per annum 106.67

And footed the sum.....$ 960.07
Added the above amount of grocery bills and interest thereon to May 1, 1869..... 437.52

And gave the sum of.....$1,397.59

As comprising the total amount of grocery bills and interest thereon, money paid, and *profits* which Forsyth must have been charged because of some agreement claimed by Vehmeyer, with interest thereon.

Of this amount charged to Forsyth, there was:
For groceries prior to April, 1867.....$338.61

Profit or commission that Vehmeyer claimed he was to have had in some way..... 200.00
Interest 205.28

A total of $843.89
Which had nothing to do with any advance of money.

Having thus made up the total of his charges against Forsyth, including everything to May 1, 1869 (as above shown).....$1,397.59
Vehmeyer credited Forsyth by Iowa Land, November 1, 1868..... 600.00

And deducted it, *stating the "Balance"*.....$ 797.59

Then as the debtor charge had included interest on everything to May 1, 1869, he credited interest on the Iowa land, six hundred dollars, "from November 1, 1868, to May 1, 1869," six months, at the rate of ten per cent. per annum....$30.00

He also inserted a credit as follows:
December 30, 1868, By one car of wood..... 32.00

(The date in the transcript given for the last item is "Dec. 30, 1869," but as it is included in the account dated in three places May 1, 1869, and to which a letter is attached dated May 4, 1869, and referring to one of May 1, 1869, it is clear that the date of the last item should have been Dec. 30, 1868.)

The two sums of $30 and $32 last mentioned are in the account deducted from the balance first named; and the final balance is in the account *stated* to be $735.59 on the first day of May, 1869.

Beneath this a statement of credit of forty-five cords of wood at $5—$225; and profit on it $45; which amounts are footed at $270; and as it is not deducted here, it would seem to be a statement of the way the $270 was made up which was above deducted from the $1,123.40.

To this *Statement of Account* is attached a letter dated May 4, 1869, signed by the plaintiff Vehmeyer, with two postscripts, each signed with his initials. In the letter he said: "I have made your bill as small as I could. If I had made it smaller, I would not be doing justice to myself."

Before leaving this *statement of account,* and what it shows, it should be observed that the total cash paid Forsyth was paid for wood and was..$923.40 according to this statement of account, and that the wood was to be $5 a cord.
Also that of the credit of $270, there was 45 cords of wood at $5 ..... 225.00 which must have been applied on the amount advanced for wood
Leaving only .....$698.40 of those advances of money.

Next it appears from the account that the grocery bills bore interest at the rate of six per cent. only, and the money advanced bore interest at the rate of ten per cent.; each debt being kept separate; and the interest at these respective rates being separately computed on each, until May 1, 1869; and as the interest on the $600 credited for Iowa land, November 1st, 1868, was computed at the rate of ten per cent. to May 1, 1869, to balance the same rate charged on the money advanced, and not at the rate of six per cent. to balance the rate of six per cent. charged on the grocery bills, this account shows that the $600 was to be applied and was applied on the debt for money advanced; which was a separate debt, and bore interest at the rate of ten per cent.

The commission or profit on the wood was not to have come due till February 1, 1869, so the $600 paid November 1, 1868, did not apply on that.

It was for the interest of the debtor to have the payment applied on the debt bearing the higher rate of interest; it was probably also for his interest to have it applied on the debt for money advanced if he had received money for the wood and had not delivered the wood; it was natural, also, if Vehmeyer had contracted to advance five dollars per cord on wood that he was to have a commission of a dollar a cord for selling, and had advanced some of the money and found he could not receive and handle the wood (from difficulties in his own yard or trouble in switching) that he should have bargained to be let off and to receive the land instead; and finally the paper is to be taken most strongly against him who propounded it; and from all these causes it appears by the writing that the $600 paid

in Iowa land November 1, 1898, was by Forsyth applied (Vehmeyer agreeing in the application) to payment of the debt for money advanced, and reduced the separate debt for that money advanced from $698.40 to $98.40; and that all the balance of the debt shown by that stated account (except that sum of $98.40) was made up of the grocery bills and claims for commissions and interest.

Jacob Forsyth, being still on the stand, he was asked (Trans., 52; Marg. p. 97):

Q. "You may state whether or not at the time the money is alleged to have been paid to you by Mr. Vehmeyer on account of this wood you had 200 or more cords of wood in your possession?

Plaintiff objected and the objection was sustained.

Q. You may state whether or not, Mr. Vehmeyer, in his account against you, upon which suit was brought and judgment recovered, he charged you with the profit which he would have made upon the 200 cords of wood in question?

Plaintiff objected and the evidence was excluded.

(Transcript, p. 52.) The defendant then offered to prove by this witness that at the time of the alleged sale by him to Vehmeyer of the 200 cords of wood in question, he had more than 200 cords of wood in his possession, which he was ready and willing and able to deliver to Mr. Vehmeyer as the latter demanded; and that Mr. Vehmeyer, after a portion of this wood had been delivered, countermanded the order; and requested Mr. Forsyth not to ship any more wood—because it was difficult to get cars, etc., for the shipping of it.

Defendant further offered to prove by this witness that at the time of trial of this suit originally brought by Vehmeyer against this defendant *that Vehmeyer testified* that he had an open account with Mr. Forsyth for groceries; that he had advanced to him certain amounts of money on account of wood; and that he had credited Mr. Forsyth with certain amounts of money paid by him on account; that he had charged Mr. Forsyth with a commission or profit on 200 cords of wood, claimed to have been sold to him: the sum being $200 or $1 per cord; and that after

having made that charge he received from Mr. Forsyth and credited him with the sum of $600, on account; that this was the only cause of action which he, Vehmeyer, had or claimed to have against Forsyth at the time of the trial.

Also that Mr. Forsyth at the time of that trial testified, that he, Vehmeyer, had ordered Forsyth not to ship any more wood, after he, Forsyth, had shipped about 45 cords of wood.

Plaintiff objected and the court sustained the objection and excluded all of the evidence, so offered.

Wherever above in this statement it appears that the court sustained the objection of plaintiff or excluded the evidence offered the defendant then and there duly excepted.

FIRST.

The first point made by plaintiff in error is on the defendant's plea of discharge in bankruptcy, and the third replication of the plaintiff which averred *that there is not any record, of the discharge in bankruptcy,* granted to said defendant, mentioned and set forth in defendant's said third plea, remaining in the said District Court for the District of Indiana, in manner and form as the defendant has above in his third plea alleged.

The discharge was proved by the exemplification of the record (transcript, p. 55); and *the finding of that issue for the plaintiff* (trans., 20; marg. 34) *was and is against the law and the evidence.* (Trans., 82; marg. p. 148, 9th.)

SECOND.

The second and third points are on the second replication of the plaintiff to the defendant's plea of discharge in bankruptcy, and defendant's rejoinder to said replication.

The declaration is on p. 14, marg. p. 22.

The plea referred to is on p. 7, marg. p. 7, second paragraph.

The replication is on pp. 8-9, marg. p. 10 (2).

The rejoinder is on p. 12.

The finding of the issues thereon for the plaintiff is on page 20, marg. p. 34.

And the point made is that—

The finding of the issue on that replication for the plaintiff is contrary to the evidence.

There is no evidence whatever to sustain the matter averred, for avoidance of the discharge in bankruptcy.

The only averment that the debt was "created by fraud" within the meaning of the exception of the bankrupt act is, that the action in which was rendered the judgment declared on was brought "to recover damages claimed by the "plaintiff in said action by reason of alleged fraud prac- "ticed by the defendant upon said plaintiff, by which the "plaintiff was induced to advance and pay to the defendant "a large amount of money, to wit: about the sum of "$1,200, by the false and fraudulent representations of "the defendant that he, the defendant, *owned and had in "his possession* ready for delivery a large quantity, to "wit: *six* hundred cords of cordwood in Lake County in "the State of Indiana."

The next line avers "that the said action and the right to recover therein were founded solely upon *the said fraud* of the defendant."

The only evidence offered to support that averment was the testimony of Frake. He gives what he judges is the substance of a judgment and verdict and a declaration. The verdict and judgment do not support above averment, except so far as they tend to show that the averments of the declaration have passed in rem judicatam. And the only part of the frame which Mr. Frake gives, as like the declaration, which touches or nears this point is the sentence (trans., 27; marg. p. 47): "represented unto the plaintiff that he *had* a large amount of *birch* cordwood, to wit: the sum of two hundred cords, cut and piled up near the Pittsburg and Fort Wayne in the county of Lake and State of Indiana."

In the matter of fraud the amount alleged is of the es-

sence of the inducement to give credit, and must be precisely proved though stated under a videlicet. (1 *Greenleaf Ev.*, Secs. 58, 60.)

A representation that a person had *six* hundred cords of *cordwood* might form an inducement to advance twelve hundred dollars; where a representation that he had *two* hundred cords of *birch* cordwood might be no inducement at all. In a wooded country a court would almost take judicial cognizance, that where ordinary cordwood is beach and maple, and is worth four dollars a cord, birch is the poorest kind of cordwood (worse than basswood) and worth less than two dollars a cord.

Proof that defendant said that he *had* the wood, would not prove that he said that *he owned and had in his possession* the wood.

Proof that he said that he had the wood *cut and piled up near the Pittsburg and Fort Wayne* in Lake County, Indiana, *ready to be shipped to Chicago,* would not prove that he said that he owned and had in his possession *ready for delivery* in Lake County, Indiana, the wood, etc.

Cut and piled up near the Pittsburgh and Fort Wayne, the wood might be ready to be shipped to Chicago, when the swamps should freeze up, so that it could be hauled out, or when the railroad should put in a station where it could be delivered, or when the railroad would accept wood as freight. It might be where that railroad would not or could not receive it. That particular railroad ran at that time through wild and impassable swamps, with no stations for many miles. That is not in the record. But naming the railroad only identifies in a general way where the wood lay, cut and piled in little piles, ready to be hauled out and shipped or piled up and measured to be delivered. The proof of all the particulars (studiously avoiding any assertion that it was ready for delivery) was not equivalent to proving he said it was *ready for delivery* in that county with all that would imply, as to cordwood.

Lastly, proof that he said he had *two* hundred cords of *birch* cordwood was by no means equivalent to proof that he said he owned and had in his possession *six* hundred cords of cordwood, to induce a man, who had twelve hunred dollars, to lend it to him.

And so we say that this averment of the replication, put in as an averment of fraud, has no evidence to sustain it, and the finding of the issue upon this replication was contrary to the evidence.

Tayloe v. *Riggs*, 1 Peters, 591, pp. 600, 601.

THIRD.

Though the Superior Court found the issue on that replication for the plaintiff and found the facts to be as averred in that replication, they were not sufficient to avoid the effect of the discharge in bankruptcy, and the Superior Court erred in giving judgment against the defndant.

The defendant duly excepted to the judgment. (Trans., 83; Marg. p. 149.)

These pleadings are above collated in the statement of facts.

The replication is as follows (Trans., 8), beginning at the foot of the page (We reprint the averment as we printed it under the last point above):

That the action, in which was rendered the judgment declared on, was brought "to recover damages claimed by " the plaintiff in said action, by reason of the alleged " fraud practiced by the defendant upon said plaintiff, by " which the plaintiff was induced to advance and pay to " the defendant a large amount of money, to wit: twelve " hundred dollars, by the false and fraudulent representa- " tions, of the defendant, that he, the defendant, owned " and had in his possession, ready for delivery, a large " quantity, to wit: six hundred cords of cordwood, in " Lake County in the State of Indiana."

The next line shows that the averment of the facts constituting the supposed fraud was ended, for it says: "That " the said action and the right to recover therein were " founded solely upon *the said fraud* of the defendant."

All that might have been true, and yet the wood might not have been worth the cost of chopping; or it might have been chopped in the woods and swamps, where it could not be hauled out except on the ice, and open winters

might have prevented till it had rotted so as to be worthless; or for some other cause it might be worthless.

To what extent the inducement went is not stated. It is not stated that the plaintiff relied on the representations. They might have been an inducement, but a very minor one, without which plaintiff would have made the advance.

Such a general charge of fraud is no charge at all.

Shafer v. *Davis*, 13 Ill., 395.
Newell v. *Bureau Co.*, 37 Ill., 253.
Kirkland v. *Lott*, 2 Scam., 13.
Wisdom v. *Becker*, 52 Ill., 342.

The facts averred in that replication established by the court *finding the issue for the plaintiff* on that replication, are not sufficient to defeat the operation of the discharge, in bankruptcy, to discharge Forsyth from the debt in judgment.

Neal v. *Clark*, 95 U. S., 704, pp. 708-9.
Wolf v. *Stix*, 99 U. S., 1, pp. 7-8.
Hennequin v. *Clews*, 111 U. S., 676, pp. 681-3.
Palmer v. *Hussey*, 119 U. S., 96, pp. 97-8.
Noble v. *Hammond*, 129 U. S., 65, pp. 68-70.
Upshur v. *Briscoe*, 138 U. S., 365, pp. 376-8.

If every fact stated in the replication was proved, it would not overcome the discharge in bankruptcy, because it would not prove that the debt was *created by fraud* within the meaning of the act of congress.

It may be argued for the defendant in error that other facts were proved *in addition to those alleged in the plaintiff's pleading*, which should be considered to support the claim of the plaintiff.

Before looking at such evidence, we will suggest that if evidence was given *going beyond the replication and tending to prove matters not alleged in it*, such evidence cannot be considered because the fact it tended to prove was not in the case. Evidence to the contrary of this irrelevant evidence would have been irrelevant. (*Stringer* v. *Young*, 3 Peters, 320.) Where the facts alleged are not enough to authorize the relief or judgment sought, the pleading is not aided by evidence tending to show matters of fact not alleged, and not in issue.

Walker v. *Ray,* 111 Ill., 315, p. 321.
Crocket v. *Lee,* 7 Wheat., 522, p. 525.
Harrison v. *Nixon,* 9 Pet., 483, p. 503.
Tayloe v. *Riggs,* 1 Pet., 591, p. 598.
Disbrow v. *C. & N. W. Ry. Co.,* 70 Ill., 246.
T. W. & W. Ry. Co. v. *Jones,* 76 Ill., 311.
Very v. *Levy,* 13 How., 345.

In this case the record is, that *the court finds the issues for the plaintiffs.* (Trans., 20; Marg. p. 34.) The court found nothing but the issues. All the rest of the judgment is matter of law; and the court erred in rendering judgment for the plaintiff, where the discharge in bankruptcy was proved by matter of record, and there was nothing in the issues setting up any defense to it.

Substantial defects in a declaration can always be taken advantage of by motion in arrest of judgment or *on error.*

Culver v. *Third N. Bk.,* 64 Ill., 528, p. 532.
Haynes v. *Lucas,* 50 Ill., 436, p. 439.
Wilson v. *Myrick,* 26 Ill., 34.

FOURTH.

If the court can go outside of the issues made by the pleadings in this case; and can consider all matters tending to show fraud in the original debt, though they may not have been averred in this case, in the replication to the plea of discharge in bankruptcy, and should consider that the declaration in the case of 1871, is proved by the testimony of Frake; and that his testimony overcomes all other evidence touching the matter of fraud in the creation of the debt; still, *a declaration in the words testified to by Frake, though sustained by a verdict of guilty, and merged in a judgment, entered in the very words given by Frake, would not avoid the effect of the discharge in bankruptcy; for, given its utmost scope, it does not show that the debt, in judgment, was* CREATED BY FRAUD *within the meaning of the phrase in the bankrupt act, describing the exception to its effect.*

The rule of this court requires that if any opinion has been filed in the court below a copy thereof shall be annexed to and transmitted with the record.

The rule has been complied with in this case. But it is to be remembered that *the opinions of the Appellate and Supreme Courts of Illinois are no part of the record,* in the cases in which they are filed.

Moore v. *Williams,* 132 Ill., 591, p. 593.
Coalfield Co. v. *Peck,* 98 Ill., 139, pp. 144, 145.

The opinion filed below purports to set out the declaration as testified to by Frake, but there is an inaccuracy (the word *sell* is left out in the last part of the averment, and the conclusion, from the word *Wherefore,* as given in the opinion is not at all as Mr. Frake testified to it). We will, therefore, ask your Honors to consider the supposed declaration as found in the record at pages 27-28 (Marg. p. 46-49) or as compiled from the record above in this brief.

It is apparent that the legal effect of the written record (whenever that has been established by evidence) is a question of law (*Flannagan* v. *Pierson,* 42 Tex., 1; 1 *Thompson on Trials,* §§ 1065, 1067, 1071); and that this question of law is a federal question, when it arises upon a *plea* and proof of discharge in bankruptcy, and replication, that the debt was created by fraud, within the meaning of the bankrupt act of the United States.

The cases cited above under the third point sustain this (fourth) point also, namely:

Neal v. *Clark,* 95 U. S., 704, pp. 708-9.
Wolf v. *Stix,* 99 U. S., 1, pp. 7-8.
Hennequin v. *Clews,* 111 U. S., 676, pp. 681-3.
Palmer v. *Hussey,* 119 U. S., 96, pp. 97-8.
Noble v. *Hammond,* 129 U. S., 65, pp. 68-70.
Upshur v. *Briscoe,* 138 U. S., 365, pp. 376-8.

The point is, that, giving the evidence produced by Vehmeyer the utmost scope that it will bear, it did not amount to evidence that the debt of Forsyth was created by fraud, *according to the sense of that expression in the*

bankrupt act; and the courts of Illinois erred in assuming that it did amount to such proof, either as *res adjudicata* or as presumptive evidence.

Evidence that the action was "*trespass on the case,*" does not tend to show that it was for a debt created by fraud.

The action of assumpsit is an action of trespass on the case upon promises. An action for malicious injury to one's clothing, or other property, or for personal injury, or for the burning of grass or crops, or fences or buildings, or stacks, by sparks from a locomotive may be an action of trespass on the case. Those words, *trespass on the case*, do not imply a debt created by fraud, any more than the words, *action at law* would imply that the action is for a debt created by fraud.

The evidence of the contents of the first declaration was, by the testimony of the plaintiff's attorney, who begun the former action as well as this,—testimony given after a neglect *for twenty-six years* (by the party who called him) to restore the burned record under the common law or under Section 2 of Chapter 116 of the Revised Statutes of Illinois of 1874, when in the nature of things, no man could remember that any particular words were or were not in the lost paper. (*Nichol* v. *Miller*, 37 Ill., 387, p. 410; *Marshall* v. *Peck*, 91 Ill., 187, pp. 189, 190.)

Neither the prejudice of the witness in favor of his client, nor the infirmities of memory after so many years of neglect, nor the fact that the law would not allow the witness to study out what was material for him to swear to and write it out in his closet and read such paper as his testimony, or look at such paper while testifying (*1 Greenleaf on Ev., Sec.* 436, 438; *Thompson on Trials, Sec.* 400), could add words which the witness did not speak, nor facts to which he gave no testimony. They could not put words into his mouth which he did not utter, nor supply material testimony which he did not give.

Therefore we must consider the declaration in the words above printed; *in issue by the general issue;* the verdict in words to which he testified:

"We the jury find the defendant guilty and assess the plaintiff's damages at $833.35;"
and the judgment in the words to which he testified:
"Therefore it is considered by the court that the plaintiff have and recover from the said defendants his said damages $833.35, in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefor."

If that declaration, issue, verdict and judgment, in the words given, without the addition of a syllable, does not prove that the debt was created by fraud, it was not proved.

That it was created by fraud within the meaning of the bankrupt act was an affirmative averment of the replication, it must be *proved,* or the repliant must be held to have failed in his proof.

U. S. R. S., Sec. 5,117. ***No debt created by the fraud or embezzlement of the bankrupt,*** or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Sec. 5,118. No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.

Sec. 5,119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. (Statute of March 2, 1867, Ch. 176, Sec. 33, 34; 14 U. S. Statutes at large, 532, 533.)

This court has determined that certain principles govern the construction of these sections, and has established the most liberal construction in favor of discharge, and an extremely strict construction of the section of exceptions, and has applied these principles to the facts in a number of cases, often reversing the judgments of the highest state courts.

By application of the maxim *noscitur a sociis* and other rules of construction this court finds that the words "cre-

ated by fraud" in the statute, are to be strictly construed, and allow no collateral latitude whatever; that they include only such frauds as are of the same grade of moral turpitude with embezzlement; and that frauds which involve less turpitude, or are incidental or collateral, so that the debt was not, in fact, created by the fraud itself, constitute no bar to the discharge; and that "such a construction of the statute is consonant with equity and consistent with the object and intention of the congress. * * * A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." (*Neal* v. *Clark*, 95 U. S., 704, pp. 708, 709.)

The judgment of the Supreme Court of Virginia was reversed by this decision.

In *Hennequin* v. *Clews*, 111 U. S., 676, this court reaffirms the above stated principles of *Neal* v. *Clark* (p. 681); and having mentioned the reasons leading to the first adoption of construction favorable to discharge (p. 679), and referred to decisions of state courts which were contrary to these principles (p. 680), and returned to the doctrine of *Neal* v. *Clark*, the court proceeds (p. 682): "The English authorities are more in accord with the decisions in this country which take a different view from our own on this question." The court then states cases where it would hold the debt discharged, of which the English case said: "no doubt this debt was incurred by fraud" (p. 683), and cites numerous English cases of like character. The court then says: "It is evident that the English courts regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt acts." The case then affirms "the liberal construction made in favor of the certificate of discharge in this country," and concludes: "We think that the previous decisions of this court, and of the state courts in the same direction, accord with the true spirit and meaning of the Act of Congress, and with the necessities of our business conditions." (pp. 683-4.)

In this case the judgment of the Court of Appeals of New York was affirmed.

Wolf v. *Stix,* 99 U. S., 1, at page 7, distinguishes that "to come within this exception of the bankrupt act, the debt must be *created* by fraud"; and inasmuch as the whole creation of debt was not by fraud, but the fraud was in an incident, or collateral part, it was held that the debt did not come within the exception. (The judgment of the U. S. Circuit Court was reversed.)

In *Palmer* v. *Hussey,* 119 U. S., 96, at page 98, this court held that "the fraud and trust established by the findings were not of a character to bar the effect of the discharge." * * * *

"It is clear that, under the ruling of this court in *Hennequin* v. *Clews,* 111 U. S., 679, there was no such fraud in the creation of the debt, * * * as to bar the operation of the discharge."

In *Noble* v. *Hammond,* 129 U. S., 65, this court, at pages 68 and 69, considered the principles of decision so enunciated in *Neal* v. *Clark, Wolf* v. *Stix,* and *Hennequin* v. *Clews,* and concluded (p. 70): "The judgment of the Supreme Court of Vermont is in conflict with the *principles* laid down by the decisions of this court, as well as the general drift of those of the several state courts, and is, therefore, reversed."

In *Upshur* v. *Briscoe,* 138 U. S., 365, at pages 376-378, this court reviews the several cases above cited, beginning with the words (p. 376): "The construction by this "court of Section 33 of the bankruptcy Act of 1867 has "been as follows" (then follow references to said cases): The court then cites a Massachusetts case (pp. 377-8), which distinguishes between the creation of the debt by fraud, and the effect of associated, collateral or incidental frauds, which did not create the debt.

The case then proceeds to apply the principle of extremely strict construction, to limit other associated words to the narrowest possible application.

If *trusts* within the meaning of the statute, were by construction limited to such as "implied a fiduciary relation existing previously to, or independently of the transaction from which the excepted debt arose," as strict a construction applies also to *the creation of the debt,* referred to in the statute.

In deciding that the words limiting discharge, are to be very strictly construed, and that they do not embrace debts arising from trusts of the character involved, this court, in *Neal* v. *Clark*, 95 U. S., at page 708, quotes from the opinion of the court delivered by Mr. Justice McLean in *Chapman* v. *Forsyth*, 2 How., 202: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. * * The cases enumerated—the defalcation of a public officer, executor, administrator, guardian or trustee, are not cases of implied but special trusts, and the other fiduciary capacity mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those implied from the contract. A factor is not therefore within the act." The same language was quoted as furnishing one reason for the decision of *Hennequin* v. *Clews*, 111 U. S., at page 679. Applying parallel reasoning to the matters alleged in the supposed declaration of *Vehmeyer* v. *Forsyth*, on which the judgment was supposed to be obtained in 1871, it appears that if Forsyth was not discharged from that debt, very few borrowers or purchasers on credit could have been discharged. Every lawyer who, about the time of borrowing, boasted a little too much of fees earned, every farmer who said he was about to haul his crop to town and that it was a large one, when he intended to haul only part, every merchant who boasted a little too enthusiastically of his sales, at the time of borrowing or receiving credit, would have created by fraud, the debt incurred.

These cases apply very closely to the case at bar. They hold that the line "no debt created by the fraud or embezzlement" of the bankrupt, by association of words, limits the meaning of the word fraud to such frauds as are of the character of or equal moral turpitude with embezzlement; and that this limitation of meaning by the association extends to bar breaches of all ordinary agencies and mercantile and special trusts, from the operation of the section. If culpability, or violation of strict integrity can be spelled out of said supposed declaration, still there was no such creation of the debt by fraud, as these cases require, to annul the discharge in bankruptcy pleaded by Forsyth.

We will now examine more closely the evidence produced by Vehmeyer, held by the courts of Illinois to prove that the debt of Forsyth was created by fraud, within the intent and meaning of the act of congress.

The first abstract named the case "Assumpsit," the second named it "Trespass on the Case."

Actions are ordinarily begun by præcipe, in which the plaintiff's attorney directs the clerk to issue a summons commanding the defendant to answer unto the plaintiff in a plea of "trespass on the case upon promises" (or any named action) to the damage of the plaintiff of (any sum named.) (*Meservey* v. *Beckwith*, 41 Ill., 452, p. 453; *Durham* v. *Eaton*, 28 Ill., 264, p. 271; *Thompson* v. *Turner*, 22 Ill., 389, p. 390.)

An action of *assumpsit*, so-called, is an action on the case, and *is properly entitled in the declaration an action of trespass on the case.* (*Carter* v. *White*, 32 Ill., 509.)

The precise language of precedents need not be followed, and in assumpsit it is mainly necessary that a consideration shall be expressed and a promise based on that consideration. (*Read* v. *Walker*, 52 Ill., 333.)

All declarations begin with the statement that plaintiff complains of defendant, who has been summoned in a plea of—naming the action thus: trespass on the case—trespass on the case upon promises—assumpsit—or other name. The clerk, who is a ministerial officer, cannot judge from the averments, but takes the name of the action from this naming, or from the præcipe where no narr. is filed. So these abstract clerks take their note from the name given, and the note is not evidence what the declaration contains. If the declaration when filed is variant from the writ, the defendant may waive the variance and plead to the merits, or plead the variance. (*C. & T. C. & R. Co.* v. *Lickiss*, 72 Ill., 521, p. 522; *Meservey* v. *Beckwith*, 41 Ill., 452, p. 454; *1 Chitty Pl.*, 442, 254-5.)

In any event the fact that an action is "trespass on the case" does not tend to prove that fraud is averred in any form. (3 Bl. Com., 158, 159, 122; 2 Chitty's Pleadings, 1-2, "Beginnings and Conclusions of Declarations";

Puterbaugh Common Law Pl., 6th Ed., 882; Same title, 7th Edition, pp. 75-6.)

"Trespass on the case," is, "the form of action at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force; or which is the indirect or secondary consequence of such act." (*Black's Law Dic.*)

The verdict which is the response to the issue is, in nearly all cases, "guilty" or "not guilty;" and a verdict of guilty does not, in itself, carry any suggestion of fraud. (Puterbaugh Com. Law Pl., 7th Ed., 843.)

The only evidence supposed to show fraud, is the declaration testified to by the witness.

If that is written out in consecutive form, with every hesitation and ambiguity in the testimony resolved in favor of Vehmeyer, the declaration is as follows:

"Henry F. T. Vehmeyer, by Buschel & Frake, his attorneys, plaintiff, complains of Jacob Forsyth, defendant, summoned, etc., in a trespass on the case:

"For that whereas, heretofore, to wit: on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money (to wit: the sum of $1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord wood (to wit: 200 cords), cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake and State of Indiana, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the 200 cords of wood, he the defendant, would immediately ship said cord wood to the city of Chicago; that the plaintiff, Vehmeyer, relying upon these representations being true, advanced to the defendant said sum of $1,000;

"That the defendant shipped only the sum of 40 cords of wood to the said Eldredge, from which he, said Vehmeyer, received the sum of $6 per cord;

"That the representations of the defendant falsely, were false and fraudulent;

"That he did not have, nor never did have, in the county of Lake, and State of Indiana, 200 cords of birch cord wood piled up ready for shipment to the city of Chicago, to *sell* said Eldredge; but only had, neither in the county of Lake, nor anywhere else—but only had the sum of 40 cords of birch cord wood which was shipped by the said defendant to the said Eldredge.

"Wherefore the plaintiff was damaged to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

In view of the construction given by this court to the provisions of the bankrupt law as to discharge of the debtor, it is necessary that the court examine this supposed declaration, to see whether it proves that the debt was *created by fraud* within the meaning of the bankrupt act.

The first averment towards such fraud is that "in order to induce plaintiff to advance him a large amount of money (to wit: $1,500 or $1,200)."

There is no suggestion that plaintiff did advance twelve hundred dollars, but only a less sum.

The substance of the averment is "a large amount of money," the videlicet only limits the amount to the sum named or less, and it might be any sum less than that named. The videlicet is only a parenthetical expression.

The second averment challenges scrutiny.

It begins with the words "falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cordwood (to wit: 200 cords) cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake, and State of Indiana, ready to be shipped to Chicago."

That was not a representation that he had 200 cords, but only a representation that he had a large amount, not exceeding 200 cords; and it was literally true if he had forty cords at the place stated, ready as stated. (*Bouvier Law Dic., Videlicet;* 1 *Greenleaf Ev.*, § 60; *Stephen on Pleading*, 318; *Brown* v. *Berry*, 47 Ill., 175, p. 177; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

If an action of assumpsit or trover had been brought laying damages at $1,200, averring that defendant bought or converted to his own use, a large amount (*to wit:* 200 cords), at the price of, or worth, $6 per cord, etc., and general issue had been pleaded, and evidence given that plaintiff sold defendant 40 cords at $6 a cord, or that defended converted to his own use 40 cords (the property of plaintiff), worth $6 a cord, the verdict in either assumpsit or trover would have been an unqualified verdict of *guilty;* and in either action the jury would have assessed the plaintiff's damages at $240. (*Tidd Pr.*, 869, 870.)

The amount under videlicet is satisfied by proof of a less amount. (*Straight* v. *Hanchett*, 23 Ill. App., 584, pp. 588-9; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

The third averment is: "That one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when shipped."

It is noticeable that the witness started to testify that the averment was that *he* had contracted to sell to Eldredge, but he retracted that as wrong, and substituted that Eldredge had contracted to purchase said wood; that is—"a large amount (to wit: 200 cords") when it should be shipped.

It is also noticeable that *no one contracted to ship that or any wood to Eldredge.*

The fourth averment is: "that if the plaintiff would advance to him at the rate of five dollars per cord for the 200 cords of wood, he, the defendant, would immediately ship said cordwood to *Chicago.*"

But it is to be noticed that *there was no suggestion that Vehmeyer should receive the wood, or have anything to do with it, or with any of the proceeds, or that Forsyth should sell it after it should reach Chicago.*

The fifth averment is: "That the plaintiff, Vehmeyer, relying upon the representations being true, advanced to the defendant said sum of $1,000."

It is to be observed that *Vehmeyer took no security upon the wood; that he asked no more right or interest in it or its proceeds than on defendant's clothing; and that defendant did not promise to pay him one penny that he might receive for it.*

The sixth averment is: That Forsyth actually shipped 40 cords of wood to Eldredge, from which Forsyth paid Vehmeyer $240.

(Whether this 40 cords was birch wood or where it was shipped from is not averred.)

The seventh averment is: "That the representations of the defendant falsely were false and fraudulent."

That is not an averment of fraud. What representations were averred to be "falsely" do not appear; but the averment is in effect that only such representations as were falsely made were fraudulent, without specifying any as false, except in the next subsequent averment.

The eighth averment is: "That he did not have, nor never did have, in the County of Lake and State of Indiana, 200 cords of birch cordwood piled up and ready for shipment to the city of Chicago *to sell said Eldredge*, but only had 40 cords of birch wood which was shipped by said defendant to said Eldredge."

The whole sentence is to be taken together. *The words describing what he did not have are words of essential description.*

The second averment had been that he represented to the plaintiff that he had a large amount of birch cordwood, not exceeding 200 cords, cut and piled up, ready to be shipped *to Chicago*. "This eighth averment is that he did not have 200 cords of birch cordwood piled up and ready for shipment *to sell said Eldredge;* but that he did actually ship forty cords to Eldredge. This admits that if he did not have 200 cords, he did have a large amount, not exceeding 200 cords (that is, to wit: 200 cords).

There was no averment that Forsyth had no other property in Illinois, or that this wood should be so placed that Vehmeyer could levy on it if he should get judgment.

The whole averment only amounts to a vague promise that if Vehmeyer would lend him $1,200 he would hurry around and get some goods into a market town, which he said he had in an adjoining county. And that was all.

Vehmeyer lent him $1,000, and did not seek in any way to connect the wood with the loan. He was to have no control of or connection with or security on it. The loan was a simple unsecured loan to Jacob Forsyth, for which he did not even take a promissory note.

If as collateral to that debt he had taken Forsyth's agreement to ship 200 cords of wood to Chicago and sell it, and pay the money over to him, and Forsyth had sold the wood and kept the money, all the above cases show that his discharge in bankruptcy would have been absolute; and this declaration shows nothing like an embezzlement, or fraud, within the meaning of the bankrupt act.

The last clause of the declaration as given in the opinion of the Supreme Court of Illinois is: "Wherefore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

Those words "fraud and deceit" are no part of any averment, and have no effect at all, being mere surplusage.

Ayers v. Richards, 12 Ill., 146, p. 148.
Puterbaugh's Pl. Common Law, 6th Ed., 832.
2 Chitty's Pleadings, 1-2, 4.

The clause testified to was:

"Wherefore the plaintiff was damaged to the extent of $1,500, and thence he brings this action of fraud and deceit against the defendant."

Upon that declaration with general issue pleaded, if Vehmeyer had proved that August 10, 1868, he loaned Jacob Forsyth $1,000, and had received $240 from Forsyth, paid thereon, what would have been the Verdict?

Clearly: "We the jury find the defendant guilty; and assess the damages at $——" (naming the amount of money due).

No evidence would have been required to be given upon any of the collateral averments, or upon any averment aside from those of the mere loan of the money.

Lusk v. Cook, Breese, 84.
Burnap v. Wight, 14 Ill., 301, p. 303.
Hiner v. Richter, 51 Ill., 299.
1 Chitty's Pleadings, 232, 233.

If the debt had been created by fraud, it could not have been proved without proving the fraud. As the judgment proved could have been got, on that declaration, without any evidence of fraud, that judgment, read in evidence, is not evidence that the debt was created by fraud.

Wells on Res Adjudicata, Sec. 3, 203, 213, 214, 215, 216, 224, 226, 227.
2 Smith's Leading Cases. Hare & Wallace Notes, 794.
McCall v. Carpenter, 18 How., 297, p. 302.
Washington Packet Co. v. Sickles, 5 Wall., 580, p. 592.

Russell v. Place, 94 U. S., 606, pp. 608-610.
Wood v. Jackson, 8 Wend., 9.
Althrop v. Beckwith, 14 Ill. App., 628, pp. 632, 633, 634.
Mervin v. Lewis, 90 Ill., 505, p. 509.
Riverside Co. v. Townshend, 120 Ill., 9, pp. 17, 18.
Chicago v. Cameron, 120 Ill., 447, p. 459.
Atty. Gen. v. C. & E. R. R. Co., 112 Ill., 520, p. 539.
Umlauf v. Umlauf, 117 Ill., 580, p. 587.
1 Black on Judgments, Sec. 611, 624.

Warner v. *Cronkhite*, 6 Bissell, 453, supports the last above proposition with clear reason and authorities. It was decided in the Eastern District of Wisconsin:

At page 458 the court says: "Now in the case at bar what does the record show? The complaint in the action, in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations *in an exchange of property*. It was not an action *upon contract, with immaterial allegations of fraud*, but it was an action grounded *solely upon the fraud*.

* * * *

As the record of the action shows *a material and traversable allegation of fraud as its sole foundation*, the debt or demand may fairly be said to be one of fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. *In re Whitehouse*, 4 Nat. Bankruptcy Register, 93."

The distinction is apparent, for the action of Vehmeyer against Forsyth in 1871, was upon a contract to repay money loaned, with immaterial allegations intended to give a color of fraud, and discredit the defendant; allegations which were not material or traversable. There is no form of pleading, in which the defendant could have traversed the so-called allegations of fraud, so as to bar the action. If Forsyth should have attempted to traverse the averments of fraud only, the plaintiff would have taken judgment *nil dicit*, on the contract, for the amount due on the loan. (1 Tidd. Pr., 562.)

Pages 458-9 (continuing): "*The distinction must not be ignored* between the question as it presents itself in the case at bar, and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial."

"Upon the record it would seem, that, *had there been no fraud, there could have been no claim*, and had there been no fraud, and consequently no claim, there would have been no judgment."

Thus the distinction between that case and the judg-

ment of Vehmeyer v. Forsyth is apparent. The claim in Vehmeyer's declaration on the contract of the borrower, was not at all affected by the supposed fraudulent representations. The declaration would have been as complete without any averment of such representations as it is with them in it, as printed above.

This is further made apparent by the review of certain New York cases:

Pages 459, 460, referring to *Wood* v. *Henry*: "In that case, the defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. * *

A majority (6 to 2) of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, proof of the fiduciary relation was not indispensable to recovery. Here is a plain distinction, between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was in short the sole cause of action.

Prouty v. *Swift*, 51 New York, 594, is in character and principle like *Wood* v. *Henry*, while *Roberts* v. *Prosser*, 53 New York, 260, enforces the principle applied in the case at bar as distinguished from the other cases cited."

Page 461: "In the case of *Palmer* v. *Preston*, 45 Vermont, 154, cited by defendants' counsel, the action was upon contract. *Fraudulent representations had been made to procure a certain indorsement*, but the fraud was not the foundation of the judgment."

This Vermont case seems to be like the one supposed in the declaration of Vehmeyer v. Forsyth (of 1871), which alleges that certain supposed fraudulent representations were made by Forsyth to procure the loan of the money, but they were not the creation of the debt, or even necessary to the cause of action or judgment.

The cases so cited and reviewed by the United States Court for Wisconsin (when both Judge Drummond and Judge Davis participated in the preparation of opinions on such general points, for precedents in the circuit) contain some matters peculiarly applicable to the consideration of the evidence in this case, held by the Illinois courts to prove that the debt of Forsyth was created by fraud, which may be cited from the reports themselves.

Whitehouse, petitioner, 4 National Bankruptcy Regis-

ter, 63 (published as a leading case in 29 Federal Cases, 1,032).

LOWELL, J. (with Judge Shipley): "The bankrupt was arrested on an execution issued from the Superior Court. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before the bankruptcy.

* * * * *

"The civil action, in which he is arrested, is distinctly and *solely* founded on fraud, and so is within the equity of the exception of section 33.

* * * * *

"We are of opinion that the record of the action * shows *a material and traversable allegation of fraud as its sole foundation.*"

Wood v. *Henry*, 40 N. Y. (1 Hand.), 124: A declaration or complaint alleged that defendants, as commission merchants, received certain property from plaintiffs, for sale; that they sold the property and kept the money. Judgment was taken by default. Executions against the bodies of defendants were issued, which were set aside by the trial court (pp. 124, 125), and that order having been affirmed by the Supreme Court at general term, was removed into the Court of Appeals. In affirming the judgments, the Court of Appeals said:

Page 128: "In the present case it may have been wholly impossible for the defendants to deny that they owed the money claimed by the plaintiff, or that the consideration of the indebtedness was the receipt of moneys arising from the sale of the plaintiff's goods. And yet they may be quite able to show that they were not commission merchants, and that the circumstances under which they acted did not establish any fiduciary relation between them and the plaintiffs, but the relation of debtor and creditor merely. If so, then by no possible answer which the defendants could truthfully interpose could they have prevented judgment for the plaintiff for the amount claimed. Admitting the debt, they could not demand a trial to determine the extrinsic facts, when the jury must necessarily have found a verdict for the recovery of the money. We have no provision for the trial of such collateral questions, and no warrant for a judgment other than that the plaintiffs recover so much money, with costs."

That precisely expresses Forsyth's predicament—summoned on the above supposed declaration of 1871.

In *Prouty* v. *Swift*, 51 N. Y., 594, the opinion is by the only judge who dissented on this point in *Wood* v. *Henry*, and refers to a declaration much like that supposed of Vehmeyer v. Forsyth, of 1871.

Page 601: "The only other question remaining to be considered is raised by the exception to the referee's finding of law, that the defendants acted in a fiduciary character, within the meaning of subdivision 2 of Sec. 179 of the code.

That was not warranted by the issues which he was called upon to try. The character or nature of defendants' employment was not an issuable fact. This I deem to be settled by the decision of *Wood* v. *Henry*, 40 N. Y., 124. It was wholly immaterial to the plaintiff's right of recovery, whether the legal liability, which the defendants had incurred, resulted from a fiduciary relation, or that of debtor and creditor merely, in the ordinary and common acceptation of those terms. The action was, substantially, so far as it related to the demand for the recovery of the money in question, one for money had and received to and for the plaintiff's use; and he would have been entitled to a judgment therefor, notwithstanding a finding by the referee (in case he had so found) that the defendants did not act in a fiduciary capacity."

Roberts v. *Prosser*, 53 N. Y., 260, was decided as follows:

Page 263: "*Wood* v. *Henry*, 40 N. Y., 124, * went upon the ground that a recovery might have been had under the allegations of the complaint without showing any fiduciary relation between the parties. In the action now in question it is very clearly otherwise."

Palmer v. *Preston*, 45 Vermont, 154, goes upon the same distinction. The question decided was that the debtor was discharged by his certificate in bankruptcy.

Page 156: The vital question in the case is whether the debt sought to be collected in this suit was created by fraud. If so, the defendant's discharge in bankruptcy is no bar to the enforcement of its payment by the court.

If the record of the judgment in suit is examined, it will be found that the debt, evidenced by the judgment, was created by the contract which the defendant entered into.

Page 157: "The defendant would not now be allowed to impeach the judgment, by showing *that no such contract, as the record of the judgment discloses*, existed between the testator and himself, or that the indebtedness, evidenced by the judgment, was created by fraud, *and not by contract.*"

Page 158: The court quotes from the case of *Whitehouse*, where it holds, that if the declaration shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be founded on fraud; but proceeds on page 159 to follow the decision of Judge Nelson (of this court), that where the judgment shows that the debt sought to be enforced was *created by contract* (and not by fraud) it imports verity, and the plaintiff cannot afterwards claim that it was created by fraud, even though in his declaration, on which that judgment was obtained, he had alleged any amount of fraudulent statements of the debtor, to induce the creditor to enter into the contract, on which he had obtained his judgment.

These cases lead to the conclusion (as shown in *Prouty* v. *Swift*), that the court, in the trial of 1871, upon the above printed declaration, at issue by any plea that could put it at issue, would have entered judgment for the plaintiff, if the jury had found the following special verdict:

We the jury find that on the 10th day of August, 1868, the plaintiff (Vehmeyer) loaned one thousand dollars to the defendant

(Forsyth), that to induce the plaintiff to advance said money to him, the defendant represented unto the plaintiff that he had a large amount of birch cord wood cut and piled up near the Pittsburgh, Fort Wayne & Chicago Railway, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when it should be shipped into said city; and that if Vehmeyer, the plaintiff, would advance to him five dollars per cord for two hundred cords of said wood, he (defendant) would immediately ship said cord wood to the city of Chicago; that the plaintiff (Vehmeyer) relied that the representations of the defendant were true, and believed that he would do as he agreed; that at the time stated, said Forsyth had more than two hundred cords of birch cord wood, cut, and piled up near said railway, at the place stated, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood in the city of Chicago, at six dollars per cord, from time to time, and whenever it should be shipped into said city; that a few days after said loan was made, said Vehmeyer offered to receive said wood in the city of Chicago for said Forsyth, and sell and deliver the same to said Eldredge upon the payment by said Eldredge from time to time of the sum of six dollars per cord therefor, as he had contracted with said Forsyth; that thereupon said Forsyth began shipping said wood to said Vehmeyer in said city of Chicago, and said Vehmeyer so received from said Forsyth and sold to said Eldredge, under said contract 45 cords of said wood for which he received six dollars per cord, amounting to $270; that said Eldredge then being unable to procure cars for transportation of said wood to his lime kilns, refused to purchase or receive any more of said wood; and said Vehmeyer notified said Forsyth, and directed said Forsyth to ship no more of said wood to him, said Vehmeyer. Said Forsyth never shipped any of said wood to said Eldredge. That deducting his charges for receiving and selling said wood, said Vehmeyer has credited to said Forsyth the sum of $166.65 out of said $270 so received.

If upon the foregoing facts the law is with the plaintiff, we find for the plaintiff and assess his damages at $833.35; and if the law is with the defendant we find for the defendant.

Upon that verdict the court would have entered judgment for the plaintiff.

It seems to be demonstrated that the averments of the declaration supposed to show fraud, are immaterial, not traversable, and that the judgment does not tend to show that the debt was created by fraud within the meaning of the bankrupt act.

The law is, that the burden of proof as to the former issue is on the person who sets up the judgment, and *he must make it clear and decisive* (WELLS *on Res Adj.*, Sec. 215); and "*a judgment is* NO EVIDENCE *of matter to be inferred from it by argument.*" WELLS on *Res Adjudicata*, Sec. 216.)

"A judgment is NO EVIDENCE *of a matter which comes collaterally in question merely, nor of matter incidentally cognizable, or to be inferred only by argument, or construction, from the judgment."*

Lawrence v. Hunt, 10 Wend., 80 pp. 83, 84.
Wells on Res Adjudicata, Sec. 200, 201, 202, 224.
Broom's Legal Maxims, 335.
2 Smith's Leading Cases, Hare & Wallace Notes, 793 (*677).

It is apparent that the question at issue and tried in the case of Vehmeyer v. Forsythe in 1871, was not the same question which is at issue in the present suit, upon the averments to overcome the effect of a discharge in bankruptcy in 1880, duly pleaded and proved.

In 1871 there had been no proceedings in bankruptcy, and the question whether the debt had been "created by fraud" according to the true intent and meaning of the bankrupt act should not have arisen.

To make the judgment of 1871 an estoppel and res adjudicata on that point, that point must have been *a vital issue* on the former trial, as said by *Black on Judgments* in Sec. 226. It could not have been an issue at all; and whether that judgment was for tort or on contract is wholly immaterial to the question and issue raised for the first time (for the confession and avoidance of the plea of discharge), by the reply that *the debt alleged was created by fraud within the meaning and intent of the bankrupt act.*

To apply the maxim, *transit in rem judicatam,* it is essential that the question decided in the former action be *the same question* now raised; it must be *the same point.* "The conditions * * are, that *the same identical matter* shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." "The judgment * * *directly upon the point,* is * conclusive between the same parties, upon the same matter directly in question in another court, * * (or) coming incidentally in question in another court, for a different purpose. *But neither* the judgment of a concur-

rent or exclusive jurisdiction *is evidence of any matter which came collaterally in question * * nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*

BROOM'S LEGAL MAXIMS, 328, 331, 334, 335.

It is not necessary to the conclusiveness of the former judgment, that issue should have been taken upon the precise point which is controverted in the second trial; it is sufficient, if that point was *essential to the finding of the former verdict."* (1 GREENLEAF ON EV., Sec., 534.)

That the debt of Forsythe was created by fraud within the intent and meaning of the bankrupt act, was not a point *essential* to the finding of the former verdict. Even the point that there was any fraud at all in obtaining the credit by Forsyth was not a point *essential* to the finding of the former verdict; that point could only be inferred by argument from the declaration and judgment; it was only incidentally cognizable by the jury because it was suggested in the declaration, but as it was not essential to the finding of the verdict which the jury found, nor to the judgment which was entered, it only came collaterally in question.

Let us return to a more comprehensive analysis of this declaration, which will further demonstrate that *there was no fraud, in the creation of the debt, alleged in that declaration.* The declaration is that—

"To induce plaintiff (Vehmeyer) to advance him (Forsyth) a large sum of money (to wit: the sum of twelve hundred dollars)—falsely and fraudulently represented unto the plaintiff, that he had a large amount of birchwood (to wit: two hundred cords) cut and piled up near the Pittsburgh and Ft. Wayne in the County of Lake and State of Indiana, *ready to be shipped to Chicago;* that one Eldredge had contracted to purchase said wood at six dollars per cord in the city of Chicago when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of five dollars per cord, for the two hundred cords of wood, he, the defendant, would immediately ship said cordwood *to the city of Chicago."*

"That the plaintiff, Vehmeyer, relying upon the representation being true advanced, to the defendant, said sum of one thousand dollars."

There is no averment that the defendant did not have a large amount of birchwood cut and piled up as stated ready to be shipped to Chicago. There is no averment that he did not have two hundred cords so ready to be shipped *to Chicago.*

There is no averment that Eldredge had not contracted *to purchase* said wood, at six dollars per cord, *in Chicago,* when shipped.

There is no averment that Forsyth did not immediately ship said cordwood *to the city of Chicago.*

NOTE: The purchase by Eldredge was to be *in Chicago;* the wood was to be shipped to Forsyth himself or to some agent for him; and if Eldredge should purchase, as he had contracted to do, he would pay cash on delivery of the wood. Eldredge was neither to pay for the wood before its delivery; nor was Forsyth to allow the carrier to deliver the wood to Eldredge without payment of the price of the wood.

The only averment having the form of a traverse of the alleged representations, lacks the substance, it is as follows:

"That the representations of the defendant falsely were false and fraudulent; that he did not have, nor never did have, in the County of Lake and State of Indiana *two hundred* cords of birch cordwood, piled up, and ready for shipment to the City of Chicago, *to sell said Eldredge;* but only had forty cords of birch cordwood which was shipped by the said defendant, *to said Eldredge.*"

NOTE: That averment was true if he had an hundred and ninety-nine cords; or if he had two hundred cords, and it was not all piled up; or if he had it piled up for shipment to Chicago to sell to any one but Eldredge. That averment was true if forty cords were delivered to Eldredge, and he refused to take any more.

The qualifying words, are specific words, they limit the general words; they are necessarily to be considered to determine what was averred; and those words being considered, the averment does not traverse the truth of the statements Forsyth is alleged to have made to induce the

loan of the money. (*Bally* v. *Kenrick*, 13 Price, 291; *Tipping* v. *Clark*, 2 Hare, 383, 390; *King* v. *Ray*, 11 Paige, 235, 239; *Davis* v. *Mapes*, 2 Paige, 105, 106.)

In an answer in chancery, to an interrogatory in the bill, a negative pregnant, will only evade the question: an answer which adds *a qualification* to the matter alleged or traversed evades the allegation and is impertinent (*Ibidem*, *Cooper's Equity*, 313; *Mitford's Eq.*, 250; *1 Daniels Ch. Pr.*, 4th Ed., 725 and note), and certainly where it is alleged that certain representations were made to induce a person to lend money, the declaration must traverse the truth of those identical representations, must state that the plaintiff relied on the truth of the representations, must state what of those representations were untrue, and cannot shift the ground, evading the truth of those representations, and substitute either a pregnant denial, which admits the truth of the general statement, or an averment that a different or qualified matter did not exist.

NOTE: That the averment, with the qualifying words, did not traverse the truth of the representations alleged to have been made by Forsyth (in that declaration of 1871) is illustrated by testimony actually given, and by testimony offered in the trial court in this case and contained in this record:

Robert C. Forsyth testified that he heard the instructions given to the jury (in the 1871 trial). That he heard the judge say that there had been no fraud proven, that Vehmeyer was receiving the wood, and declined to receive any more.

John Marshall testified that he was a witness on the trial of 1871, and remembered some of his testimony. Forsyth's attorney then offered to prove by him that he testified that Forsyth had more than the two hundred cords of wood at the time Vehmeyer claimed that he wanted it; that Vehmeyer was then handling and cutting wood for Forsyth at Cassello, Indiana; and that Vehmeyer instructed the witness not to ship any more wood to him on account of Forsyth. Also that he heard Vehmeyer testify at that trial, that he (Vehmeyer) had ordered Forsyth not to ship any more of the wood. (The court excluded this evidence.)

Jacob Forsyth being on the stand was asked, whether or not at the time the money is alleged to have been paid to him by Vehmeyer on account of this wood, he had 200 cords and more in his possession. This was coupled with an offer to prove by him that at that time he had more than the 200 cords of wood there, which he was ready and willing to deliver to Vehmeyer; and that after about forty-five cords of this wood had been shipped he ordered Forsyth not to ship any more, because he (Vehmeyer) could not get cars to reship it, etc.

Non constat but the declaration of 1871 was drawn with its peculiar wording, because Vehmeyer could not deny that every representation made by Forsyth when he borrowed the money was true; and that seems very probable in view of the above testimony given, and that offered with the witnesses upon the stand to answer the questions asked, and excluded.

FIFTH.

..The courts of Illinois erred in excluding the evidence offered by Forsyth tending to show that the judgment of 1871 was upon the debt only; and that it did not embrace any question whether that debt was created by fraud within the meaning and intent of the provision of the bankrupt law of the United States.

Russel v. Place, 94 U. S., 606, p. 608.
Packet Co. v. Sickles, 5 Wal., 580, p. 592.
Wells on Res Adjudicata; Secs. 200, 201, 215, 216, 297, 302.
Lawrence v. Hunt, 10 Wend., 80, p. 84.
Wood v. Jackson, 8 Wend., 9, p. 36.
2 Black on Judgments, Sec. 624.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.
1 Greenleaf on Ev., Sec. 532.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if upon the whole record it remains doubtful whether *the same* subject-matter was actually passed upon, it seems that parol evidence may be received to show the truth. So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all, with the same propriety, the judgment is not conclusive, but only *prima facie*, upon any one of the propositions, and evidence *aliunde* is admissible to rebut it. (*1 Greenleaf on Ev.*, Sec. 532.)

Defendant offered competent evidence tending to show that plaintiff, Vehmeyer, did not make any claim of fraud on the trial in 1871, and that such point or question was not adjudicated at that trial; and that Vehmeyer, himself, testified that Forsyth had the wood, and shipped part of it, and he, Vehmeyer, stopped him from shipping more.

These offers assumed a variety of forms, to which we will refer after citing the court to some authorities which show the competency and relevancy of the evidence excluded.

It also appears that the defendant, Forsyth, offered to prove by competent evidence that the court instructed the jury that no fraud had been shown in the case, and that it was the duty of the jury, simply to determine the amount, if any, which Forsyth owed to Vehmeyer.

Exclusion of the evidence was error.

Wells on Res Adjudicata; Sec. 200, 201, 215, 216, 297, 302.
Lawrence v. Hunt, 10 Wend., 80, p. 84.
Wood v. Jackson, 8 Wend., 9, p. 36.
2 Black on Judgments, Sec. 624.
1 Greenleaf on Ev., Sec. 532.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if upon the whole record it remains *doubtful whether the same subject-matter was actually passed upon,* it seems that parol evidence may be received to show the truth."

1 Greenleaf on Evidence, Sec. 532.

Greenleaf divides the section here, and proceeds: "So, also, if the pleadings present distinct propositions," showing that the clause above quoted applied to where the propositions are not distinct, and judgment may be given on proof of part of the averment, as in the instance at bar where it could be given on proof of the loan, without any evidence of any fraud to induce the loan.

The courts of Illinois erred in excluding testimony as to what evidence was given on the trial in 1871.

In *Hitchin* v. *Campbell,* 2 W. Bl., 827, at page 831, the court says:

"But the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is that the same evidence will sustain both the actions. Putt v. Royston, 2 Shaw, 211; Payne, 472; 3 Mod., 1; Polfexen, 634; Mortimer v. Wingate, Moore, 463; Bro., Action on the case, 97, 105. These relate to the whole of the demand; but the same reasoning extends to a part of it only; as 4 Co., 92 b, Slade's case."

"Lord Eldon, Ch. J., said that this was the true test. Martin v. Kennedy, 2 Bos. & P., 71."

Wells on Res Adjudicata, Sec. 201, 203.

Washington Packet Co. v. *Sickles,* 5 Wallace, 580, where it cites

Wood v. *Jackson,* 8 Wend., 36, etc.

The instructions of the court, by which the case was submitted to the jury were competent evidence of what was substituted for their judgment. The jury were bound to follow such instructions. The court, in sending

them out to deliberate, may have instructed them: "There is no evidence tending to show any fraud, and you have nothing to do with any claim of fraud; all you have to decide is whether Vehmeyer lent Forsyth money, and if so how much, and to deduct $240 for wood that Vehmeyer admits he has received from Forsyth.

If you find that Vehmeyer did not lend Forsyth any money, the form of your verdict will be: 'We, the jury, find the defendant not guilty.'

If you find that Vehmeyer did lend Forsyth money, the form of your verdict will be: 'We the jury find the defendant guilty, and assess the plaintiff's damages at $——;' naming the amount you find due."

If the court so instructed the jury on the case, that shows the precise matter adjudged by the jury. *It is the province of the court* to determine what are the actual issues,—on what questions there is any evidence, and to limit their consideration to those matters.

The opinion of the court (by Marshall, C. J.) in *Tayloe* v. *Riggs*, 1 Peters, 591, contains matters closely applicable to the case, and to the point before us:

Page 598. "Secondary evidence having been properly admitted * the next inquiry is into its competency to establish the contract stated in the declaration."

* * * * *

"Does the testimony offered by the plaintiff in the Circuit Court prove this contract?"

After stating the testimony of the witness as to the contents of the lost paper, the court speaks of subsequent statements (Page 599): "This part of the testimony shows, that, what the witness had previously said was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself."

* * * * *

Page 600. *"When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection, concerning its stipulations, ought to supply the place of the written instrument.* The substance of the agreement ought to be proved satisfactorily. And, if that cannot be done, the party is in the condition of every other

suitor in court, who makes a claim which he cannot support. When parties reduce their contract to writing, *the obligations and rights of each are described and limited by the instrument itself.* The safety which is expected from them, would be much impaired if they could be established upon uncertain and vague impressions."

* * * * *

"Upon the most attentive comparison we can make of the testimony given by the witness with the contract stated in the declaration, we think that the evidence does not support the contract as laid, and was therefore not competent to support the first count.

* * * * *

"The testimony does not show a contract which supports the second count."

If the supposed judgment is to prove that the indebtedness was *created by fraud* so that the discharge in bankruptcy is no bar, the question to be decided from the evidence in this case is: Was there a judgment of the Superior Court of Cook County, Illinois, entered on or about the 29th day of July, A. D. 1871, which *proved* that the debt was *created by fraud*, and was of that character which the law excepted from the operation of the discharge?

When upon the trial Forsyth had testified that he knew what he was sued for. "I have that account with Vehmeyer, which shows precisely what it was for." "I have in my possession a statement made by Vehmeyer of his account against me as it stood prior to the trial of the case in 1871," counsel for plaintiff, Vehmeyer, objected, that whether it was signed by Vehmeyer, and addressed to Forsyth was immaterial. He said he did not care to look at the paper. "I do not care to go *into the trial* of this original suit any more; *it is res judicata.*" The court said: "I sustain the objection;" and to that ruling of the court the defendant then and there duly excepted. (Trans., 45-47; Marg. p. 89.)

Afterwards defendant was allowed to prove that the documents were signed by Vehmeyer and given by him—

for the purpose of fully describing and identifying them.

But the court excluded all the evidence as to what took place at that trial, and as to the claim on which the suit was brought.

And apparently it was because it had been objected that *the evidence was immaterial because the matter was res judicata:* that is that *the defendant was estopped, by the evidence tending to show the judgment, from giving evidence tending to show what the judgment was for.*

The opinion of the Appellate Court, adopted by the Supreme Court of Illinois, shows that those courts, both, took the same superficial view.

The law is as old as the maxim:

"Non potest adduci exceptio ejusdem rei cujus petitur dissolutis."

"A matter the validity of which is at issue in legal proceedings cannot be set up as a bar thereto." (*Broom's Legal Maxims,* 166.)

All three of the courts of Illinois assumed that there was a *record of judgment* proved as res adjudicata, entered July 29, A. D. 1871, because a witness testified that all the files and the record in the case had been destroyed by fire in 1871, *twenty-six years before he testified,* and he had not read a line of them or any copy of even a line of them, for twenty-six years, and could not state the contents of the declaration, but only the substance (Trans., 24; Marg. p. 42); and because in answer to the question, "Go on and state your best recollection of what that declaration contained; give as near as you can the contents of that declaration?"—he had given his impression (after twenty-seven years) of the substance (not the words) of a declaration which he said that he drew and filed on the 21st day of July, 1870.

Counsel for the plaintiff had his witness testify to the burning of the papers and record, and then asked him:

"Q. Is it possible to produce an original declaration?" He answered: "It is not."

"Q. *Nor any copy of it?* A. It is not."

"Q. Did you preserve any copy made at the time? A. I did not." (Trans., 25; Marg. p. 44.)

The counsel had his witness testify in effect that he did not remember the contents of the declaration, but remembered only the substance. (Trans., 24; Marg. 42.)

All this was necessary, because:

If it was possible to produce an original declaration, that was the best evidence.

If no original could be produced, a copy would be the next best evidence of the contents of the paper.

And evidence of the words, the actual contents of the paper would be better evidence than the testimony of a witness who could not tell what the contents of the paper were, because of lapse of time or lapse of memory, but could only give the impression left on his memory as to what was its substance and idea.

Each kind of evidence was weaker and more remote than that preceding; and he gave *the weakest kind of evidence* of which his case was capable.

Surely his weak impression did not amount to res adjudicata.

Again: His impression was of a paper which he says he drew and filed on or before July 21, 1870. That may have *tended to prove* what the issues were on which the case was tried in May, 1871; and on which judgment was entered July 29, 1871; but that declaration may have been changed before or during the trial—amendments are very liberally allowed; or the party or his counsel may, in open court, have waived the allegation of fraud—may have disclaimed all claim of fraud—and have proceeded for the debt. If the defendant had not objected, or if the declaration had averred that Forsyth promised to pay the money (only three words) the judgment would have been sustained by the declaration (though there was no evidence of the supposed fraud); and would not have been erroneous.

Of course, the witness may have been wholly mistaken in his impression. He may have talked with Vehmeyer, and got an impression from those preliminary talks that the claim was for a deceitful or fraudulent borrowing. (His testimony, stricken out on objection, shows that he had such talks.) (Trans., 24; Marg. p. 41-2.)

That is stricken out, but it furnishes a vivid picture of

preliminary conversations which might have been had, and of which the impression was left on his memory as to the substance of the claim. The impression of a scandalous charge, the discussion of particulars of outrageous wrong suffered by a client, in his anger or malice, told to, and believed by his attorney, would make a far deeper impression on the memory of the lawyer, than the ordinary humdrum details of a declaration in assumpsit, or a special count in case, alleging no fraud.

This is on the subject of memory, and an illustration is found in one of the cases cited. This court said:

"This part of the testimony shows, that what the witness had previously said (as to the substance of the writing) was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself." (*Tayloe* v. *Riggs,* 1 Peters, p. 599.)

Besides, the Supreme Court of Illinois have recognized as common knowledge that after twenty years *no man could remember that any particular words were or were not in the lost paper.* (*Nichol* v. *Miller,* 37 Ill., 387, p. 410; *Marshall* v. *Peck,* 91 Ill., 187, pp. 189, 190.)

Certainly, when plaintiff had given nothing but such uncertain evidence, tending so weakly to show the contents of the lost record, the trial court was very far from having a judgment so proved, as to estop the defendant from giving evidence tending to show that the judgment was anything else than such as the witness supposed.

The witness may have got his impression from some other man's case, or from some extraneous cause that could not be traced.

Ordinarily the law recognizes that a witness may be mistaken in his view originally, or in his impression or memory, or he may deliberately testify to that which is false.

The memory and impression may be shown (if evidence is permitted) to be so inconsistent with proved and certain facts, that it cannot be believed.

When the party has stood by for twenty-six years, when he could have perpetuated the evidence, or could have restored the record under the common law or under Sec. 2

of Ch. 116 of the Revised Statutes of Illinois (passed in March, 1872), until there is only the weakest and most uncertain of evidence to sustain his claim, shall he now profit by his delay, by having his shadowy evidence erected into a *record,* when no one lives, or has for more than twenty years lived, who could testify that he *read the declaration* on which the trial was had knew its contents, and that it did or did not contain any particular words?

Rather will he be held to be "in the condition of every other suitor in court who makes a claim which he cannot support." (*Tayloe* v. *Riggs,* 1 Peters, p. 600.)

The courts of Illinois overlooked the fact that *when the defendant began to put in his evidence nothing had been established;* only a *prima facie* case had been made that *the records had been destroyed* and parol and other secondary evidence of their contents made admissible; and a little very weak and imperfect evidence had been given which was supposed to *tend* to show that some *particular words and averments* were in the lost record, from which it might be inferred that the debt in judgment was created by the fraud of the defendant.

The constitution of Illinois providing that the subject of an act of the legislature shall be expressed in the title, an act was passed and took effect in March, after the great fire, entitled, "An Act to provide for the restoration of court records which have been lost or destroyed." It was declaratory of the common law. The courts of Illinois have, in the case at bar, decided that such records may be proved after a great length of time, though they have not been restored, while memories were accessible, to aid in making the new record a truthful showing of the destroyed record. Early in April (after the fire) another act was passed and took effect, entitled, "*An Act to remedy the evils consequent upon the destruction of any public records by fire or otherwise.*" Section 23 relaxed the rules of evidence. "In all cases under the provisions of this act, and in all proceedings or actions now or hereafter instituted as to any estate, interest or right in, or any lien or incumbrances upon any land, when any party * * or his

agent or attorney shall * * testify * * that the original of any deeds, conveyances, or other written or record evidence has been lost or destroyed * * *the court shall receive all such evidence as may have a bearing on the case, to establish the execution or contents of the deeds, conveyances, records or other written evidence, so lost or destroyed.*" (R. S. of 1874, Chapter 116.)

The title of the act limited the effect of the act to public records, and to the case of destruction *of public records;* and the act could include nothing else.

It would seem that the evil which the act was designed to remedy was as great where destroyed records of judgments are involved that do not directly affect an interest in land, as those that do. The judgment sued on may be made a lien and enforced by sale of land, and the effect on title is as great in the one case as the other.

One evil designed to be remedied was the difficulty in ascertaining the exact terms and effect of judgment records, which had been destroyed by fire or otherwise, and nearly all cases in which the remedy would be required were named, one condition seems to have been inadvertently omitted.

It was a remedial statute, and to be liberally construed to advance the remedy, and, under many authorities it would be held to relax the rules of evidence, in order that the truth of the matter may be attained in all cases, where the end is to reach the exact truth as to the contents and legal effect of the *judgment,* or other public record, which has been destroyed by fire or calamity. (*Endlich on Statutes,* Sec., 295; *Sutherland on Statutes,* Sec., 409, 413 and note 2.)

"If they be in like reason, they are in like law." (Co. Litt. 191 a.) In consimili casu, consimile debet esse remedium. Qui haeret in litera haeret in cortice. (Brooms Legal Maxims, 685-687; *Castner* v. *Walrod,* 83 Ill., 171, pp. 178-9.)

It is not important to this case that the construction suggested be put upon the act quoted. We have cited it to show how such things are proved in most cases in Illinois, but we stand on this ground:

Wherever a condition is established in which remote, parol and secondary evidence is admissible to ascertain the

contents and effect of a record destroyed by calamity, and one party has resorted to such evidence TO ESTABLISH *his version of the lost record, the other party may give remote, parol and secondary evidence to establish his view, or to get at the truth of the matter.*

"*There are no degrees in secondary evidence;* and " therefore when the absence of primary evidence is ex- " plained satisfactory, any species of admissible secondary " evidence may be substituted for the original.

Powell on Ev., 302 (Ch. V.).
Best on Ev., Sec. 483 p. 613.

Powell says farther: "The rule is, that no evidence is to be adduced which ex natura rei supposes still greater evidence behind, *in the party's own power and possession.*" (*Powell on Ev.*, Ch. V. p. 302.) And this is the effect of the note to section 84, of 1 *Greenleaf on Evidence*, where he says, that "if from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists the party will be required to produce it."

Near the beginning of the same note, in marshalling the evidence to prove a lost paper or deed, the author gives, first a counterpart, second a copy, third an abstract, etc.; "and *last of all* the memory of a witness." All kinds of matters adapted to the condition of the subject may come under the third division of an "abstract and so forth," but *last of all*, and more uncertain than any other evidence that can be given, is the memory of a witness. Some of the reasons why this is last of all, appear in later sections. Section 88 shows that oral evidence cannot be substituted for any writing, the existence of which is disputed, and which is material either to the issue between the parties, or to the credit of witnesses; for the court acquires a knowledge of the whole contents of the instrument, *which may have a different effect from the statement of a part.* Lord TENTERDEN said: "My experience has taught me *the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments, they may be so easily mistaken.*"

In section 96 the author says: "Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens not only that the witness has misunderstood what the party said, but that, by *unintentionally altering a few of the expressions really used, he gives effect to the statement, completely at variance with what the party actually did say.*"

This is repeated in Sec. 200, and the author adds: "In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of a party.

* * * * *

"It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it.

* * * * *

"When we reflect upon the inaccuracy of many witnesses in their original comprehension, their extreme liability to mingle subsequent facts and occurrences with the original transactions; and *the impossibility of recollecting the precise terms used * or of translating them by exact equivalents,* we must conclude there is no substantial reliance upon this class of testimony.

The particular application of these words was to proof of words and sentences heard, or of the substance and effect of words and sentences translated from impressions on the memory.

And they illustrate the fact that *the plaintiff* in our case *did not have or prove a record*, but he tendered the most uncertain kind of evidence of words and sentences, by proving not a copy, nor a copy of a copy, but more remote —the words being forgotten by the witness, he gave *a supposed equivalent,* by a translation of the impression left by the forgotten words upon his memory, or an impression left by something else which he supposed to be an impression left by the forgotten words.

The instances illustrating the utter unreliability of such evidence, which Greanleaf cites, are instances of testimony given within a reasonable time, after hearing the words or reading the written instrument, the impressions of which the witness attempts to translate into new words.

In the case at bar the translation was attempted twenty-six or twenty-seven years after the forgotten words and sentences had been last seen.

The firm was Buschnell & Frake. Ordinary observation of like cases tells us that if Mr. Buschnell could have testified he would have said: "Mr. Frake is wholly mistaken. He was then a young man of little experience, and took all his client said as true, and he thought he had a case of fraud. He is one of the men who always thinks his adversary is a very bad man. He drew a declaration and thought he had fraud alleged in it; but it was very doubtful to me whether it would stand, so I substituted a plain declaration in assumpsit, and tried the case on that."

Whatever were the facts, instead of a record—a matter of res adjudicata—that the debt in judgment was *created* by fraud within the meaning of the bankrupt act, the plaintiff rested, after having given, by a single interested witness, the most remote—worse than a copy of a copy, being only a translation of an impression of forgotten words and phrases—the most remote of parol and secondary evidence admissible in case of a lost record.

We say a single witness, because the abstracter which they produced could not remember a word of the paper, or its contents, and had written "trespass on the case" as the kind of action. He could not tell from his entry or his memory whether it was a personal injury case, or an action against a bailee of some kind, or a carrier, or what the action was for.

The other abstracter put the action down as assumpsit, and that is why we thought Mr. Buschnell had withdrawn the first declaration and filed another in assumpsit, or amended the first by striking out a few words and interlining a few so as to make it a pure assumpsit.

Defendant's evidence (as stated above in the opening of this brief) established that he knew what he was sued for; that he had the written account from Vehmeyer, which showed precisely what it was for.

Robert C. Forsyth testified that in the trial of 1871 he testified to the fact that Vehmeyer had told him he did not want any more wood.

He was the last witness. He testified that he was in the witness chair, and the jury returned, and took their

seats; there was argument by plaintiff's attorney; and the judge instructed the jury that there was no fraud proven; that Vehmeyer had been getting the wood and had refused to get any more.

Defendant attempted to prove by Harmon (a law clerk at the time of the trial) that after the jury had retired they returned and asked further instruction and that the court instructed them that no fraud had been shown in the case; and that it was their duty simply to determine the amount, if any, which Forsyth owed to Vehmeyer.

The court excluded the evidence.

If that instruction was given, it was strong, and in collateral proceedings, conclusive evidence that the pleadings and the issue *at the time* warranted the instruction.

"Omnia praesumunter rite et solemniter esse acta. * * *

"The following may be mentioned as general presumptions of law illustrating this maxim: * * *

"That the records of a court of justice have been correctly made; * * * that judges and jurors do nothing carelessly; *that the decisions of a court of competent jurisdiction are well founded and their judgments regular;* and that facts without proof of which the verdict could not have been found were proved at the trial."

Prima facia the instruction of the court so given was free from error.

Brown's Legal Maxims, pp. 945, 946.

Conclusive presumption it is, that if the record was such that the court gave or could have given that instruction, the debt established by the verdict and judgment was not *created by the fraud of the defendant.*

That the judge gave that instruction to the jury *in the presence* of the pleadings and of the parties and counsel, is better evidence that there was a proper declaration to support it than the translation of Mr. Frake's impression of the effect of the forgotten words and sentences given twenty-six years or more after he had seen a word of them.

Defendant offered to prove by John Marshall that on the trial in 1871, Vehmeyer testified that he had ordered Forsyth not to ship any more of the wood. He offered to prove by Jacob Forsyth that at that trial Vehmeyer testified that he had an open account with Mr. Forsyth for groceries; that he had advanced to him certain amounts of money on account of wood; and that he had credited Mr. Forsyth with certain amounts of money paid him on account; that he had charged Mr. Forsyth with a commission or profit on 200 cords of wood claimed to have been sold to him, the sum being $200, or $1 per cord; and that after having made that charge he received from Mr. Forsyth and credited to him the sum of $600 on account; that this was the only cause of action which he (Vehmeyer) had or claimed to have against Forsyth, at the time of the trial."

The court excluded all the evidence.

If Vehmeyer so testified (as both the witnesses would have sworn) and judgment was entered for Vehmeyer on that evidence, where he had so testified in his own behalf *in a court of record*, it is very strong evidence that the judgment entered was not for a debt *created* by the fraud of the defendant, and that the pleadings were not of such a character that no judgment could be rendered on them in favor of Vehmeyer and against Forsyth, except for a debt *created by the fraud of Forsyth.*

This is under the maxim above given, and from the view of the case as a judicial proceeding in a *court of record*, before the judge thereof. On the other view the circumstance that Vehmeyer, the plaintiff, testified that he had stopped the shipping of the wood to him, and that his claim against Forsyth was upon the items mentioned, is wholly inconsistent with the idea that at that trial he was prosecuting a claim which could not be proved at all without proving that it was created by the fraud of the defendant.

The other evidence offered and rejected is the written account and letters of Vehmeyer. They were all proved to have been prepared by Vehmeyer, and signed by him, and delivered by him to Forsyth April 3, 1869, and May 4, 1869. We have stated above what they prove.

This evidence is not subject to human ills or frailties. *The words and figures and their effect stand the same* as they stood thirty years ago, when they were written. There is no possibility of a mistake as to what they were then. No illusion, or prejudice or desire or confusion of events has varied the words or figures or sentences, or the idea which they conveyed when written.

They are the original words and figures and they are immutable; and they are therefore entirely reliable as to the facts they prove, while Mr. Frake's impressions on memory, left by forgotten words, and his translation of those impressions into what he regards as equivalent or nearly equivalent phrases, possess no such attributes.

That being the true state of affairs between the parties, Mr. Vehmeyer could not have got a judgment against Forsyth after the date of these papers for a debt incurred before their date, which was created by the fraud of the defendant.

The papers prove that Vehmeyer claimed grocery bills for the year ending in 1867 and interest thereon to May 1, 1869, at 6 per cent.; that all the money advanced or paid to Forsyth was advanced a year before the date alleged in the declaration supposed by Frake, and had all been paid before May 1, 1869, but $98.40; and that all the debt which Forsyth owed Vehmeyer at that date was made up of grocery bills and interest claims for commissions and interest, and that $98.40. Vehmeyer got judgment for his claims against Forsyth accrued anterior to the date of this bill, for $833, of which more than $700 dollars was for groceries and commissions and interest, and that judgment could not have been rendered for fraud or have proved that the debt involved was created by the fraud of the defendant, unless it was obtained by the fraud and perjury of the man who carefully compiled and signed and delivered those writings in April and May, 1869.

The proposition established by the courts of Illinois in this case is, that if any one can be found, with the temerity to swear, after a quarter of a century from the time he has seen a declaration once read by him, that he can and will give the substance and effect of the lost paper, and

that it declared that the debt sued on was created by fraud, the defendant is estopped and wholly powerless to produce any evidence to the contrary, unless he can produce another witness, who can testify that he read the lost paper, and that its substance and effect was as he states it.

Mr. Frake was a lawyer, but the asserted estoppel does not grow out of that, nor out of the fact that his name appeared as plaintiff's attorney in the old case, nor out of the fact that he brought the present action for the plaintiff as his attorney. If any other man, of whatever character or business, or want of business, had testified that he read the declaration filed in that case just once, a year prior to the trial, and that the lines he repeats are in effect and substance equivalent to that he read, the estoppel would be the same.

The facts proved and offered to be proved, by the defendant, are of a more certain and satisfactory character, than the translation of impressions supposed to be left by the impression once made on memory by words long since forgotten, and the court ought to have admitted the evidence.

In the testimony of Mr. Frake for plaintiff as to the substance (not a copy) of the declaration filed in 1870, he testified that it amounted to an allegation "that heretofore, to wit, on the 10th day of August, 1868," plaintiff advanced to defendant a sum of money also given under a *videlicet*.

There is no pretense or claim by plaintiff that Forsyth incurred any debt (fraudulently) after the date given in the supposed declaration.

What were the words of the declaration on which that suit went to trial no one can tell. Whether any part of the declaration was disclaimed or waived in open court, whether any amendment was made, or what the exact words were, do not appear. The plaintiff had a right to abandon any part of his claim, or to waive it.

Ayers v. *Kelly*, 11 Ill., 17.
Fitzgerald v. *Furgeson*, 25 Ill., 138.

All we can have, on either side of the case, is secondary evidence of its contents, or evidence tending to show that the secondary evidence of the contents is imperfect, mis-

taken or untrue; that it is inconsistent with what transpired at the trial and which must be presumed to be right (*omne praesumunter rite et solenniter esse acta donec probeter in contrariam*); or that it is inconsistent with the actual status of the parties, so that it is not natural that the plaintiff prosecuted in court to judgment a suit for $1,200 obtained by fraud in a lump sum on a day certain, when there was never any such transaction, and the only indebtedness was on a running account of small matters.

There are no degrees in secondary evidence. And any evidence tending to show what the cause of action actually was on which the verdict was taken, or that it was not the matter which Frake's testimony tended to show, was competent and should have been admitted.

The evidence Forsyth offered was the best of which the case was capable.

If Mr. Frake had testified to the contents of an indictment for embezzlement, could not Forsyth have testified —I was never tried for any crime. I never read the court papers, but I know I was not tried for a crime. Vehmeyer claimed I owed him on this written account he had rendered me, and I was tried on that claim, and he got judgment for the balance on that?

Forsyth's judgment on what passed around him in court is as good as Frake's judgment on what was the substance and real meat of a paper of which he cannot give a word, and which may have been amended or in part waived in open court (to avoid error in taking judgment). Or if Forsyth's judgment on such a matter is not as good as Frake's, there are no degrees in this secondary evidence from that cause, and the difference only goes to the credibility.

SIXTH.

In *Nauvoo* v. *Ritter*, 97 U. S., 389, it was held that "in Illinois a copy of a written instrument on which the action is founded must be filed with the declaration, and it constitutes part of the pleadings in the case." The statute referred to has been in force from long before 1845, and was in force in 1870 and 1871 as follows:

"If the plaintiff shall not file his declaration *together with a copy* of the instrument *or account* on which the action is brought, in case the same is brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court, on motion of the defendant, shall continue the cause. (Gross' Statutes, 510.)

In 1838 in *The People* v. *Pearson,* 1 Scam., 458, at page 462, the Supreme Court of Illinois said: "The object of the statute is *to apprize the defendant of the precise nature of the claim* which he is called upon to answer." The defendant, Forsyth, testified (Trans., 45, 46): "I remember for what I was sued in that case. I *know* for what I was sued in that case. I have that account with Vehmeyer, *which shows precisely what it was for.*" He was not cross-examined on this, but he produced the account in Vehmeyer's hand, and signed by him. He had a right to know, by the statute and that decision, from the account, what he was sued for; and with the account preserved, so clearly authenticated, the evidence is satisfactory. Frake's vague impressions are not satisfactory. The written account, made out by Vehmeyer, dated and signed by him, with Forsyth's testimony, and with Vehmeyer present to testify about his own act, was, under the statute and the decision quoted, the best evidence of which the case was capable; for the account attached to the declaration was placed therein conformity with the statute *to apprize Forsyth of the precise nature of the claim for which he was sued.*

People v. *Pearson,* 1 Scam., 458, p. 462.

EDWARD ROBY,
Counsel.